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IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,

Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the *Rooker-Feldman* doctrine, which bars lower federal courts from conducting de facto appellate review of decisions by state courts, be expansively interpreted to additionally incorporate preclusion principles and divest federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues, notwithstanding the long-established system of dual federal and state jurisdiction?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation has no parent corporations, and no publicly held corporation holds ten percent or more of its stock. Petitioner Exxon Chemical Arabia Inc. is wholly owned by Exxon Overseas Corporation, which is wholly owned by Exxon Mobil Corporation. Petitioner Mobil Yanbu Petrochemical Company Inc. is wholly owned by Mobil Petroleum Company Inc., which is wholly owned by Mobil International Petroleum Corporation, which is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Respondent Saudi Basic Industries Corporation (SABIC) is a Saudi Arabian corporation that is owned seventy percent by the Kingdom of Saudi Arabia and thirty percent by private investors. No publicly held corporation holds ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The *Rooker-Feldman* doctrine has historically served an important but limited role of preventing the lower federal courts from exercising subject matter jurisdiction to conduct de facto appellate review of decisions previously made by state courts. In recent years, however, the federal courts of appeals have become divided over the relationship between the jurisdictional *Rooker-Feldman* doctrine and ordinary preclusion principles. Although most circuits have preserved the doctrine in its original form, the Second and Third Circuits have transformed the doctrine into a limitless, preclusion-based doctrine that eviscerates dual federal and state jurisdiction and the congressional mandate that federal courts defer to state preclusion law.

The Third Circuit determined, *sua sponte*, that *Rooker-Feldman* required dismissal of ExxonMobil's federal-court claims for want of jurisdiction simply because those claims were identical to claims in an action pending on appeal in the Delaware Supreme Court. That decision erroneously conflates the scope of *Rooker-Feldman* with that of res judicata and conflicts not only with the Court's holding in *Feldman* itself, which establishes that *Rooker-Feldman* and res judicata are not coextensive, but also with the application of the doctrine by other courts of appeals that distinguish *Rooker-Feldman* from res judicata. The Third Circuit's approach is consistent with that of the Second Circuit, which has also erroneously found *Rooker-Feldman* and res judicata to be coextensive, but that formulation directly conflicts with rulings by the Fourth, Sixth, Seventh, and Ninth Circuits, which reject the application of *Rooker-Feldman* to bar parallel adjudication of claims in federal court simply because identical claims are brought in state court.

The Third Circuit's formulation of *Rooker-Feldman* reflects a deepening disagreement among the circuits about the relationship between *Rooker-Feldman*'s nonwaivable jurisdictional bar and the affirmative defense of res judicata. Once a narrow but strict doctrine that prevented federal appellate review of state-court decisions (except in this Court), the use of *Rooker-Feldman* has substantially expanded in recent years as some lower courts, and particularly the Second and Third Circuits, have been increasingly willing to infuse ordinary preclusion doctrines into the *Rooker-Feldman* analysis. The Third Circuit's approach rewards procedural gamesmanship and forum shopping and, if adopted, would eviscerate the congressionally crafted structure of parallel jurisdiction and respect for state preclusion law.

CITATION OF OPINIONS AND ORDERS

The court of appeals's opinion, App. 1a, is reported at 364 F.3d 102 (CA3 2004). The opinion of the district court, App. 11a, is reported at 194 F.Supp.2d 378 (D.N.J. 2002).

BASIS FOR JURISDICTION

The Third Circuit delivered its judgment and opinion on March 24, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

28 U.S.C. §1257 provides:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

28 U.S.C. §1738 provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the

United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

ExxonMobil's action against SABIC arises from SABIC's conduct with regard to two joint ventures formed between SABIC and subsidiaries of ExxonMobil twenty-four years ago. In 1980, SABIC and Mobil Yanbu Petrochemical Co. (Yanbu) formed a 50/50 joint venture, Yanbu Petrochemical Co., or Yanpet. App. 13a. In the same year, SABIC and Exxon Chemical Arabia, Inc. (ECAI) also formed a 50/50 partnership, Al-Jubail Petrochemical Co., or Kemya. App. 12a-13a. ExxonMobil has asserted, and a Delaware trial court found, that an overarching principle of the governing joint venture agreements was that the partners were not to profit at the joint ventures' expense. *See* App. 3a-4a, 17a. Specifically, one provision common to both joint venture agreements required that any technology procured by a partner for the joint ventures was to be passed through to the joint ventures at the partner's cost. *See* App. 16a, 83a. Nevertheless, when SABIC procured rights to the Unipol® process, a polyethylene manufacturing method, from Union Carbide Corporation, it secretly added a substantial mark-up to the sublicense fees it then charged to both Yanpet and Kemya. *See* App. 3a, 16a. In 2000, ExxonMobil discovered the mark-up for the first time.

In October 1998, SABIC first invoked the jurisdiction of the United States District Court for the District of New Jersey by filing a suit (NJ-I) against ExxonMobil claiming that Kemya was entitled to ownership of a certain patent related to the manufacture of polyethylene. After learning of the Unipol® overcharges, ExxonMobil asserted, among other defenses, affirmative defenses based on those overcharges including "unclean hands" and setoff. App. 12a. In July 2000, one day after a failed mediation in NJ-I between the parties, SABIC filed suit against Yanbu and ECAI in Delaware state court seeking a declaratory judgment that its overcharging for the Unipol® sublicenses did not give rise to any liability. App. 3a, 83a.[1] ExxonMobil later filed an action (NJ-II) against SABIC in the New Jersey federal district court seeking damages on the ground that SABIC's overcharges violated the joint venture agreements. App. 3a, 16a. NJ-I and NJ-II were consolidated. App. 12a, 80a.

Yanbu and ECAI also asserted counterclaims in the Delaware Superior Court for damages in tort and contract for SABIC's conduct in overcharging the joint ventures. App. 3a, 84a. After a two-week trial in March 2003, a Delaware jury returned a verdict finding, among other things, that SABIC had overcharged the joint ventures in violation of the joint venture agreements and that SABIC had committed the Saudi-law tort of *ghasb* (usurpation), entitling ExxonMobil to compensatory damages that included the overcharges and actual profits generated from those overcharges. *See* App. 4a. The jury awarded, and the Delaware Superior Court entered judgment for, more than $416 million in damages to ExxonMobil. App. 4a. SABIC has appealed the verdict, and the appeal is now pending in the Delaware Supreme Court.

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[1] The court of appeals erroneously stated that SABIC's Delaware action was filed in September 2000. App. 3a.

In the federal district court, SABIC moved for dismissal of NJ-II under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 *et seq.* App. 44a. Notably, SABIC never raised *Rooker-Feldman* as a basis for dismissal. The district court denied SABIC's motion, App. 57a, and SABIC filed an interlocutory appeal to the Third Circuit. App. 3a. Concurrent with its appeal brief, ExxonMobil moved the Third Circuit to stay the federal appeal pending the outcome of the Delaware posttrial and appellate proceedings, and the court granted the stay. On November 12, 2003, although the Delaware proceedings were still pending, the court granted SABIC's motion to lift the stay and set the case for argument and submission. In deciding the appeal, the Third Circuit did not reach the FSIA question because of its conclusion that the *Rooker-Feldman* doctrine, which the court first raised on its own initiative the day before oral argument, required dismissal of ExxonMobil's claims against SABIC in the federal action. App. 3a; *see also* App. 5a.

Although not directly purporting to equate *Rooker-Feldman* with preclusion, the court of appeals apparently premised its application of *Rooker-Feldman* on its finding "that ExxonMobil's claims are identical to the claims upon which the Delaware Superior Court reached a final judgment." App. 6a. The court failed to explain how *Rooker-Feldman*—which proscribes de facto federal appellate jurisdiction over state-court decisions previously made—could apply in this case when (1) ExxonMobil does not challenge the only state-court decision already made, which was decided in ExxonMobil's favor; (2) the only state-court decision that ExxonMobil might theoretically attempt to attack (*i.e.*, the Delaware appellate decision) is still pending; and (3) federal courts have subject matter jurisdiction over

many claims that may nevertheless be barred by the non-jurisdictional affirmative defense of preclusion.[2]

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a conflict among the courts of appeals regarding the relationship of the jurisdictional *Rooker-Feldman* doctrine to res judicata principles. The Third Circuit's expansion of *Rooker-Feldman* eviscerates the well-established principle that concurrent jurisdiction may permit overlapping and even identical claims to proceed in parallel in state and federal courts as long as the claims asserted in the federal action do not challenge the result of the state-court action.

When parallel claims are pending in state court, a federal court may stay federal proceedings pending resolution of the state action while continuing to exercise subject matter jurisdiction. When res judicata applies but *Rooker-Feldman* does not, the federal district court has subject matter jurisdiction to entertain the claims and may dismiss them only if the defendant has asserted the affirmative defense of preclusion, and then only in conformance with the preclusion law of the relevant State under the Full Faith and Credit Act, 28 U.S.C. §1738. If, however, as the Third Circuit effectively held, *Rooker-Feldman* encompasses all claims that would ordinarily fall within the scope of res judicata, *Rooker-Feldman* replaces that waivable affirmative defense with a nonwaivable jurisdictional bar that trumps federal jurisdiction that otherwise exists and that a federal court may invoke *sua*

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[2] Even an adverse decision by the Delaware Supreme Court would not necessarily bar relitigation of ExxonMobil's claims under applicable preclusion principles. For example, as SABIC conceded in the Delaware Supreme Court, a reversal based on the Delaware statute of limitations—the primary argument SABIC has asserted on appeal—would not likely preclude ExxonMobil from litigating its substantive claims in another forum. *See* SABIC Reply, Case No. 493, 2003 in the Delaware Supreme Court at 6.

sponte, as the Third Circuit did, to evade exercising the jurisdiction it otherwise possesses. Application of the Third Circuit's formulation of *Rooker-Feldman* when the relevant state proceeding is still pending would mean that parallel litigation can never proceed in state and federal courts.

The Third Circuit's approach directly conflicts with the application of *Rooker-Feldman* by the Fourth, Sixth, Seventh, and Ninth Circuits, which all recognize that preclusion, abstention, and comity doctrines reconcile the inconsistencies that parallel jurisdiction could otherwise generate. Moreover, the Third Circuit's version of *Rooker-Feldman* upsets the congressionally crafted jurisdictional scheme by divesting the federal district courts of jurisdiction that otherwise exists to adjudicate claims over which state courts may also have jurisdiction. That approach rewards gamesmanship and promotes forum shopping. The conflicting authority that has arisen in numerous courts of appeals cases decided since the Court issued *Feldman* over two decades ago demonstrates that, without the Court's guidance, the conflict will continue to deepen and, given the Third Circuit's entrenched position on the subject, the conflict is unlikely to resolve itself without the Court's assistance.

I. THE COURT SHOULD STEM THE GROWING CONFLICT REGARDING THE LIMITS OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine derives from two cases the Court decided sixty years apart, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The essence of the doctrine is that federal district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings." *Feldman*, 460 U.S., at 486. The Court has never, outside of *Rooker* and *Feldman* themselves, employed the doctrine to hold that a federal district court is without subject matter jurisdiction.

Despite the Court's limited use of the doctrine, "since the *Feldman* decision in 1983, the lower federal courts have come to invoke *Rooker-Feldman*—often to find no jurisdiction—with notable frequency." Thomas D. Rowe, Jr., Rooker-Feldman: *Worth Only the Powder to Blow It Up?*, 74 NOTRE DAME L. REV. 1081, 1083 (1999). That growth has, however, given rise to conflicts over the relationship between *Rooker-Feldman* and preclusion principles. *See Noel* v. *Hall*, 341 F.3d 1148, 1162-63 (CA9 2003) (collecting cases expressing confusion about *Rooker-Feldman* and preclusion). The essential conflict is keenly illustrated by the Third Circuit's holding in this case, which transmuted *Rooker-Feldman* into a doctrine that encompasses all claims that may fall within the scope of ordinary preclusion principles and then applied it to prevent a federal court from exercising jurisdiction over matters that have not yet been finally adjudicated in the relevant state court. The Court should speak again to *Rooker-Feldman*, confine the doctrine to its proper and useful application of containing federal jurisdiction to its congressionally mandated limits, and preserve the federal courts' ability and duty to exercise their jurisdiction fully within those limits.

A. *Rooker-Feldman* Developed As a Doctrine to Prevent De Facto Federal Appellate Review of State Court Decisions.

The plaintiff in *Rooker* brought a bill in equity in federal district court seeking to have a judgment of an Indiana court, which was affirmed by the Indiana Supreme Court, "declared null and void, and to obtain other relief dependent on that outcome." 263 U.S., at 414. The plaintiff argued that the state court judgment violated the Contract Clause of the United States Constitution as well as due process and equal protection. *Id.*, at 414-15. The Court held that it "would be an exercise of appellate jurisdiction" for the federal district court to review the state court judgment. *Id.*, at 416.

The federal district court did not have jurisdiction to perform that review because §237 of the Judicial Code (now 28 U.S.C. §1257) conferred jurisdiction to review state court judgments only on this Court, while "[t]he jurisdiction possessed by the District Courts is strictly original." *Id.* Moreover, the state courts had "the province and duty" to decide any constitutional questions raised by the application of the state statute at issue. *Id.*, at 415. *Rooker* thus established the principle—derived from statute, not constitutional command—that a party cannot appeal a state court judgment in a federal district court, and the recourse for an adverse decision in a state court is an appeal to the state appellate courts, with the possibility of ultimate review by this Court. *See, e.g., Parkview Assocs. P'ship* v. *City of Lebanon*, 225 F.3d 321, 324 (CA3 2000); *accord Noel*, 341 F.3d, at 1156 ("Reduced to its essence, *Rooker* held that when a losing plaintiff in state court brings a suit in federal district court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto appeal.").

The two plaintiffs in *Feldman* had each petitioned the District of Columbia Court of Appeals (which has the same status as a state supreme court, 28 U.S.C. §1257(b)) to waive a requirement that candidates sitting for the D.C. bar exam be graduates of approved law schools. 460 U.S., at 465-69, 471-72. The D.C. Court of Appeals denied both petitions. Plaintiffs filed (separate) suits in the United States district court, each alleging that the D.C. court's denial of their waiver petitions violated federal constitutional and statutory rights. *Id.*, at 469, 472-73. The district court dismissed those claims for lack of jurisdiction, and the U.S. Court of Appeals for the District of Columbia reversed, holding that the waiver proceedings in the D.C. court were not really "judicial" and, thus, the federal district court cases did not seek appellate review of a final judgment of a state court. *Id.*, at 474.

The Court reversed, holding that the waiver proceedings were "judicial," and thus fell under the jurisdictional bar articulated in *Rooker*. *Id.*, at 482. The plaintiffs' constitutional claims arising from the denial of their particular applications were "inextricably intertwined" with their complaint that the D.C. court erred in denying their particular applications for admission, so the district court did not have jurisdiction over those elements of plaintiffs' complaints. *Id.*, at 486-88.

Plaintiffs' remaining allegations, however, which raised general constitutional attacks on the bar admission rule, were within the jurisdiction of the federal district court because those allegations did not require review of a judicial decision in a particular case. *Id.* However, the Court noted, those claims might be barred by res judicata. *Id.*, at 487-88 & n.19.

Although *Rooker* itself presented a direct attack on a state court judgment, *Feldman* further articulated the test for whether a claim that a state court has violated federal rights is a de facto attack on a previous state court ruling: "If the constitutional claims . . . are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do." *Id.*, at 483 n.16.

In the two decades since *Feldman*, the Court has addressed the *Rooker-Feldman* doctrine in only a handful of cases, and then only briefly. *See Verizon Md.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (noting that *Rooker-Feldman* "has no application to judicial review of executive action, including determinations made by a state administrative agency"); *Johnson* v. *De Grandy*, 512 U.S. 997, 1005-06 (1994) (describing "this Court's *Rooker/Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on

the losing party's claim that the state judgment itself violates the loser's federal rights"); *Howlett* v. *Rose*, 496 U.S. 356, 370 (1990) (describing *Rooker-Feldman* as "the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622-23 (1989) (observing that the appeal from the Arizona Supreme Court would have been barred by *Rooker-Feldman* if it had instead been brought originally in a federal suit); *Pennzoil Co.* v. *Texaco*, 481 U.S. 1, 7, 10 (1987) (requiring abstention under *Younger* v. *Harris*, 401 U.S. 37 (1971), instead of applying *Rooker-Feldman*, in §1983 challenge to ongoing state civil proceedings).

B. The Courts of Appeals Are in Conflict Over the Reach of the *Rooker-Feldman* Doctrine.

"Since *Feldman*, the Supreme Court has provided [the lower courts] with little guidance . . . . The result has been inconsistency in the lower federal courts faced with challenges based upon the *Rooker-Feldman* doctrine." *Moccio* v. *N.Y. State Office of Court Admin.*, 95 F.3d 195, 198 (CA2 1996) (internal citation omitted).

Almost from the doctrine's inception in *Rooker*, the courts of appeals have often confused it with res judicata. *See, e.g.*, *Ellentuck* v. *Klein*, 570 F.2d 414, 425 (CA2 1978); *Hutcherson* v. *Lehtin*, 485 F.2d 567, 569 (CA9 1973); *Roy* v. *Jones*, 484 F.2d 96, 99 n.11 (CA3 1973); *Hanley* v. *Four Corners Vacation Props., Inc.*, 480 F.2d 536, 538 (CA10 1973); *Bricker* v. *Crane*, 468 F.2d 1228, 1231-32 (CA1 1972); *Brown* v. *Chastain*, 416 F.2d 1012, 1021 (CA5 1969) (Rives, J., dissenting); *Norwood* v. *Parenteau*, 228 F.2d 148, 150 (CA8 1955). Despite the Court's holding in *Feldman* that certain claims that might be barred by res judicata were nevertheless not barred by the jurisdictional *Rooker-Feldman* doctrine, *Feldman*, 460 U.S., at 487-88 & n.19, some courts

of appeals have continued to conflate *Rooker-Feldman* with preclusion, *see, e.g.*, *Cruz* v. *Melecio*, 204 F.3d 14, 21 n.5 (CA1 2000) ("Only a state court adjudication that itself has preclusive effect can bring the *Rooker-Feldman* doctrine into play."); *Doctor's Assocs.* v. *Distajo*, 107 F.3d 126, 137 (CA2 1997) ("[T]he *Rooker-Feldman* doctrine 'at a minimum' is coextensive with preclusion principles." (quoting *Moccio*, 95 F.3d, at 199-200)), while other circuits take more care to distinguish the two doctrines. *See, e.g.*, *Ingalls* v. *Erlewine* (*In re Erlewine*), 349 F.3d 205, 210 n.4 (CA5 2003) ("Our analysis here should not be taken to imply that the *Rooker-Feldman* doctrine is simply coextensive with traditional preclusion doctrine." (citing 18B CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE & PROCEDURE §4469.1 (2d ed. 2002) (describing the subtle differences between the two bodies of law)); *Hutcherson* v. *Lauderdale County*, 326 F.3d 747, 755 (CA6 2003) ("The two doctrines 'are not coextensive.'"); *Kenmen Eng'g* v. *City of Union*, 314 F.3d 468, 476 (CA10 2002) ("Rather than prohibiting the relitigation of issues and claims (the province of the preclusion doctrines), *Rooker-Feldman* protects state-court judgments from impermissible appellate review by lower federal courts."); *see also* *Kamilewicz* v. *Bank of Boston Corp.*, 100 F.3d 1348, 1350 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) ("[A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.").

The Ninth Circuit recently undertook a detailed examination of the subtle and important distinctions between *Rooker-Feldman* and the principle of interjurisdictional preclusion codified in 28 U.S.C. §1738. According to that circuit, "[a]s repeatedly construed by the Supreme Court, in decisions both before and after *Feldman*, § 1738 requires a federal district court to give the same—not more and not less—preclusive effect to a state court judgment as that judgment would have in the state courts of the state in which

it was rendered." *Noel*, 341 F.3d, at 1160 (citing *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 369 (1996); *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 523 (1986); *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82-85 (1984); *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982), and *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980)). "The Supreme Court has never construed the *Rooker-Feldman* doctrine to give greater preclusive effect to a state court judgment in federal court than the judgment would have under § 1738. Indeed, such a construction of *Rooker-Feldman* would directly conflict with § 1738 as that statute has been construed by the Court." *Id.*, at 1160-61. Therefore, the court held that *Rooker-Feldman* did not apply to prevent Noel from pursuing identical claims simultaneously in federal and pending state proceedings. *Id.*, at 1165. To apply *Rooker-Feldman* broadly enough to bar Noel's federal suit would have "conflict[ed] with either the rule permitting parallel state and federal litigation or the rule of § 1738 requiring federal courts to follow state preclusion rules." *Id.*, at 1161.

Noel's reasoning was based in part on the formulation of *Rooker-Feldman* that has evolved in the Seventh Circuit over the past decade. *See id.*, at 1164. *GASH Assocs.* v. *Vill. of Rosemont*, 995 F.2d 726 (CA7 1993), explained:

> "The *Rooker-Feldman* doctrine . . . has nothing to do with § 1738. It rests on the principle that district courts have only original jurisdiction. . . . The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.*, at 728.

Since *GASH*, the Seventh Circuit has applied its approach to *Rooker-Feldman* numerous times. *See, e.g., Lewis* v. *Anderson*, 308 F.3d 768, 772 (CA7 2002); *Jensen* v. *Foley*, 295 F.3d 745, 747-48 (CA7 2002); *Durgins* v. *City of E. St. Louis*, 272 F.3d 841, 844 (CA7 2001); *Rizzo* v. *Sheahan*, 266 F.3d 705, 714 (CA7 2001); *Centres, Inc.* v. *Town of Brookfield*, 148 F.3d 699, 702 (CA7 1998); *Young* v. *Murphy*, 90 F.3d 1225, 1231 (CA7 1996); *Garry* v. *Geils*, 82 F.3d 1362, 1366-67 (CA7 1996). Like the Ninth Circuit, the Sixth Circuit recently approved the Seventh Circuit's approach to distinguishing *Rooker-Feldman* from res judicata. *Stemler* v. *Florence*, 350 F.3d 578, 589 (CA6 2003); *Hutcherson*, 326 F.3d, at 755-56. The Seventh Circuit's distinction of *Rooker-Feldman* from res judicata has important practical consequences because, among other things, "[w]hile *Rooker-Feldman* is entirely federal and requires no reference to principles of state law, under res judicata we look to the law of the state" to determine preclusive effect, and "under res judicata we must determine whether the party against whom the defense is raised had a full and fair opportunity to pursue its claim in the previous state proceeding." *Garry*, 82 F.3d, at 1367 n.8.

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910). The distinction drawn by the Sixth, Seventh, and Ninth Circuits between *Rooker-Feldman* and res judicata alleviates any potential tension between *Rooker-Feldman* and that rule. *See Noel*, 341 F.3d, at 1159 (noting the tension and that "the rule that overlapping or even identical federal and state court litigation may proceed simultaneously[is] limited only by doctrines of abstention and comity"); *Vulcan Chem. Techs., Inc.* v. *Barker*, 297 F.3d 332, 340 (CA4 2002) ("It is true, as a general rule, that our dual system of federal and state governments allows parallel actions to proceed to judgment

until one becomes preclusive of the other."); *cf. Pennzoil*, 481 U.S., at 12 n.9 (abstention doctrines are "designed to soften the tensions inherent in a system that contemplates parallel judicial processes"). In accord with the Sixth, Seventh, and Ninth Circuits, and with the other courts of appeals that have distinguished *Rooker-Feldman* from preclusion, *see Ingalls*, 349 F.3d, at 210 n.4; *Kenmen*, 314 F.3d, at 476, the Fourth Circuit has explained that "[i]t would be a novel application of the already beleaguered *Rooker-Feldman* doctrine to divest a federal court of subject matter jurisdiction simply because a parallel case was later filed in State court seeking to decide the same question." *Vulcan*, 297 F.3d, at 338 n.2.

In conflict with those circuits that have distinguished *Rooker-Feldman* from res judicata, the Second Circuit erroneously holds that the doctrines are at least coextensive. *Doctor's Assocs.*, 107 F.3d, at 137; *Moccio*, 95 F.3d, at 199-200.[3] That error led the Second Circuit to conclude "[i]f the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action." *Moccio*, 95 F.3d, at 198-99. That formulation directly conflicts with the Court's holding in *Feldman* itself that certain claims that may be barred by the affirmative defense of res judicata under state-law preclusion principles are plainly not jurisdictionally barred by *Rooker-Feldman*. *See Feldman*, 460 U.S., at 487-88 & n.19. Moreover, and in particular, the Second Circuit's approach directly conflicts with the Sixth, Seventh, and Ninth Circuits' express holdings that *Rooker-Feldman* applies only when "the injury of which [the federal plaintiff] complains was caused *by* the [state-court] judgment" itself rather than an out-of-court injury that the state court failed to remedy. *GASH*, 995 F.2d, at 729; *see Noel*, 341 F.3d, at 1164-65 (quoting

[3] The First Circuit also appears to equate *Rooker-Feldman* and preclusion, although it has not done so as explicitly as the Second Circuit. *See Cruz*, 204 F.3d, at 21 n.5.

GASH with approval); *Hutcherson*, 326 F.3d, at 755-56 (adopting the Seventh Circuit's approach). In the Sixth, Seventh, and Ninth Circuits, *Rooker-Feldman* does not "plainly" bar every action that would be "plainly" barred in the Second Circuit.

By distinguishing *Rooker-Feldman* from preclusion, although not as concretely as the Sixth, Seventh, and Ninth Circuits have done, the Fourth and Fifth Circuits have also rejected the Second Circuit's simple equation of the two doctrines. *See Ingalls*, 349 F.3d, at 210 n.4 (distinguishing *Rooker-Feldman* from res judicata); *Vulcan*, 297 F.3d, at 338 (discussing *Rooker-Feldman* and interjurisdictional preclusion). The Tenth Circuit, however, which previously made a careful distinction between *Rooker-Feldman* and preclusion, *see Kenmen*, 314 F.3d, at 476, recently explained that "we apply the *Rooker-Feldman* doctrine in a slightly broader fashion" than those circuits in which "the *Rooker-Feldman* doctrine is coextensive with preclusion doctrine." *Merrill Lynch Bus. Fin. Servs., Inc.* v. *Nudell*, 363 F.3d 1072, 1075 (CA10 2004) (distinguishing the Tenth Circuit's view from, *inter alia*, the Second Circuit's view in *Moccio*).

C. The Third Circuit's Erroneous and Conflicting Application of *Rooker-Feldman*.

In this case, the Third Circuit placed itself on the wrong side of the split among the circuits by falling into the same error as the Second Circuit, although stating its application of *Rooker-Feldman* in different (and inaccurate) terms. Like the Second Circuit, the Third Circuit found that the jurisdictional *Rooker-Feldman* doctrine applies simply because federal and state actions involve identical claims. Moreover, the Third Circuit went a step further by embracing the precise "novel application" of *Rooker-Feldman* the Fourth Circuit warned against in *Vulcan*—the Third Circuit divested the federal district court of subject matter jurisdiction in this case merely

because a parallel case was pending in state court seeking to decide the same questions. *See Vulcan*, 297 F.3d, at 338 n.2.

Importantly, it is not the fact that the Delaware trial court's decision is pending on appeal in Delaware that makes the Third Circuit's application of *Rooker-Feldman* wrong. *Rooker-Feldman* is appropriately—perhaps especially—applicable to bar federal challenges to decisions by state trial courts that are de facto attempts to circumvent available state appellate review. *See, e.g., Feldman*, 460 U.S., at 483 n.16 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions."); *Brown & Root, Inc.* v. *Breckenridge*, 211 F.3d 194, 198-99 (CA4 2000). In this case, ExxonMobil, the federal plaintiff, is not challenging the Delaware trial court's decision because it prevailed in the trial proceeding. But the Third Circuit aggressively applied *Rooker-Feldman* to dismiss ExxonMobil's claims merely because (1) the state case presents the same issues as the federal case and (2) the pending state appeal might result in a future decision regarding those issues that ExxonMobil might attempt to challenge.

Rather than asking, as most circuits would, whether ExxonMobil complained of an injury distinct from its claims against SABIC—that is, an injury caused by the state-court judgment itself—the Third Circuit applied *Rooker-Feldman* merely because ExxonMobil's claims based on SABIC's overcharging of the joint ventures are identical in the federal and Delaware actions. App. 6a. Properly applied, *Rooker-Feldman* bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, *based on the losing party's claim that the state judgment itself violates the loser's federal rights*." *Johnson*, 512 U.S., at 1005-06 (emphasis added). ExxonMobil's claims sound in tort and contract under Saudi law; they do not raise any questions about ExxonMobil's substantive federal rights. Most important to

the *Rooker-Feldman* inquiry, ExxonMobil—the claimant in both the federal and state suits—does not contend that any state-court judgment has caused its injuries. *Cf., e.g., Garry*, 82 F.3d, at 1365-66 ("If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not 'inextricably intertwined' with the state judgment, . . . res judicata may apply, but *Rooker-Feldman* does not."). Indeed, the only state-court judgment that has been made is the judgment in ExxonMobil's favor, which, unsurprisingly, ExxonMobil has not sought to overturn.

Initially failing to acknowledge that ExxonMobil's position in the federal suit is in full agreement with the favorable judgment of the state trial court, the court of appeals, purporting to take "a narrow view of the *Rooker-Feldman* doctrine," found that this case "presents the 'paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding.'" App. 6a (quoting *E.B.* v. *Verniero*, 119 F.3d 1077, 1090-91 (CA3 1997), which the court of appeals characterized as "describing a case in which the federal court plaintiff sought an injunction directing that a state court order not be carried out"). In contrast to the "paradigm situation" the court of appeals described, it should have been apparent that ExxonMobil's overriding interest is in having the previously made state-court judgment in its favor carried out. Similarly to the Second Circuit's flawed reasoning that any claim that might be barred by res judicata is also jurisdictionally barred by *Rooker-Feldman*, the court of appeals found the fact that ExxonMobil's claims had already been "actually litigated" in the state trial proceeding sufficient to invoke *Rooker-Feldman*. App. 8a; *compare Moccio*, 95 F.3d, at 198-99 ("If the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action."), *with* App. 8a ("Because ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached

a final judgment, they are barred by the *Rooker-Feldman* doctrine.").[4]

In essence, the court of appeals divested the district court of jurisdiction for no reason other than the prior adjudication of identical claims in the Delaware trial court, despite the fact that ExxonMobil's federal suit does not assert any injury caused by the state judgment itself, does not challenge the only state judgment that has been entered, and would not challenge any adverse decision by the Delaware Supreme Court based on SABIC's nonsubstantive appellate arguments. The court of appeals ultimately predicated its application of *Rooker-Feldman* on the potential future decision of the Delaware Supreme Court in SABIC's pending appeal—if that court overturns the Delaware trial court. App. 8a. In other words, the real effect of the court of appeals's holding is to apply *Rooker-Feldman* preemptively to divest the federal district court of jurisdiction because ExxonMobil might, in the future, attempt to attack a decision that the Delaware Supreme Court might or might not make in the future regarding claims identical to those in the federal action.

II. THE COURT SHOULD REJECT THE THIRD CIRCUIT'S EXPANSION OF *ROOKER-FELDMAN*.

The Court should grant this petition and disapprove the Third Circuit's expansive redefinition of *Rooker-Feldman*, which lacks any limiting principle that would preserve the congressionally mandated jurisdictional structure and defer-

[4] Indeed, although the court of appeals did not address state preclusion law, its *Rooker-Feldman* formulation closely mirrors elements of Delaware res judicata law. *See E.B.R. Corp.* v. *PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973) ("Under Delaware law a judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action.").

ence to state preclusion law. If applied consistently, the Third Circuit's rationale would eviscerate dual federal and state jurisdiction.

The court of appeals's reasoning provides no limiting principle that would have prevented, for example, the district court in this case from applying *Rooker-Feldman* to dismiss ExxonMobil's claims even before the Delaware trial court rendered a judgment simply because those claims might be inconsistent with the judgment the Delaware trial court might render. The court of appeals found that ExxonMobil's claims fell within the scope of *Rooker-Feldman*'s nonwaivable jurisdictional bar simply because they raise issues identical to issues in the parallel state litigation, not because ExxonMobil contends that any state-court judgment violated its federal rights. *Compare Doctor's Assocs.*, 107 F.3d, at 137 (stating the Second Circuit's belief that *Rooker-Feldman* is coextensive with preclusion "at a minimum"), *with Garry*, 82 F.3d, at 1366 (expressing the Seventh Circuit's belief that *Rooker-Feldman*, as opposed to preclusion, applies only when the federal plaintiff alleges an independent injury caused by a state-court judgment).

ExxonMobil's claims that are now barred in the federal district courts within the Third Circuit would not, assuming personal jurisdiction existed, be barred in most other circuits. *Rooker-Feldman* does not prevent a party from pursuing claims in federal court simultaneously with pursuing identical claims in a pending state proceeding, *see Noel*, 341 F.3d, at 1165, although abstention doctrine would likely counsel the federal court to hold the case in abeyance pending an expected state-court appellate judgment. *See id.*, at 1159.

The Sixth and Seventh Circuits do not apply *Rooker-Feldman* when "the injury alleged is distinct from [the state-court] judgment." *Garry*, 82 F.3d, at 1365; *see also Hood* v. *Keller*, 341 F.3d 593, 598-99 (CA6 2003); *Nelson* v. *Murphy*, 44 F.3d 497, 503 (CA7 1995) (holding that the plaintiffs

avoided *Rooker-Feldman* because they challenged the lawfulness of an act independently of a state court's approval of that act). Most circuits would not apply *Rooker-Feldman* in this case because ExxonMobil's claims, as asserted in the district court, were brought to redress injuries caused by SABIC, not by a Delaware court.

In *American Reliable Insurance Co.* v. *Stillwell*, 336 F.3d 311 (CA4 2003), the Fourth Circuit explained that *Rooker-Feldman* applies to interlocutory state-court orders and that "[i]t is sufficient that a state court render a decision resolving an issue that is the basis for the federal action." *Id.*, at 320. In this case, the relevant state court—the Delaware Supreme Court—has not yet rendered a decision that would be sufficient to invoke *Rooker-Feldman* in the Fourth Circuit. In *Vulcan*, the Fourth Circuit did not reach the *Rooker-Feldman* issue because it affirmed the district court's abstention under *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), but explained that it would be inappropriate to apply *Rooker-Feldman* to divest a federal district court of jurisdiction simply because a parallel state case seeks to decide the same question, *Vulcan*, 297 F.3d, at 338 n.2, as the Third Circuit has done in this case by applying *Rooker-Feldman* while the relevant state-court proceedings are still pending.

Because it renders parallel federal and state jurisdiction a nullity and circumvents state preclusion law, the Third Circuit's reformulation of *Rooker-Feldman* promotes gamesmanship and forum shopping. A defendant who is sued in federal district court in the Third Circuit—or any circuit that adopts the Third Circuit's *Rooker-Feldman* approach—can now defeat federal jurisdiction simply by filing a suit (*e.g.*, a declaratory judgment action) raising identical issues in state court.[5] A defendant who remains in a federal court that

[5] Indeed, the Delaware trial court concluded that SABIC "engaged in preemptive forum shopping." App. 86a ("Clearly, SABIC did win the race to the Courthouse, and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC's actions, that it did not want the New Jersey District Court to decide the overcharge issue." (footnotes omitted)).

follows the Third Circuit's approach can delay raising, or utterly fail to raise, any available affirmative defense of res judicata arising from a related state-court action and rely on the nonwaivable jurisdictional bar of *Rooker-Feldman* to preclude the federal action, even if the state-court decision would not be given preclusive effect under the State's own preclusion law. The Court should restore consistency regarding federal jurisdiction and the application of preclusion law by the federal courts by rejecting the Third Circuit's approach to *Rooker-Feldman*.

CONCLUSION

The Court should grant the petition for writ of certiorari, reverse the court of appeals's judgment, and order Exxon Mobil's claims to be reinstated.

Respectfully submitted,

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APPENDICES

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION; EXXONCHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v.

SAUDI BASIC INDUSTRIES CORPORATION
Appellant

On Appeal from the United States District Court
for the District of New Jersey D.C.
Civil Action No. 00-cv-03841
(Honorable William H. Walls)

Argued December 9, 2003

Before: AMBRO, FUENTES and CHERTOFF, Circuit Judges

(Filed March 24, 2004)

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OPINION OF THE COURT

AMBRO, Circuit Judge

Saudi Basic Industries Corporation ("SABIC") appeals from the District Court's order denying its motion to dismiss, based on sovereign immunity, the claims of two Exxon Mobil subsidiaries, Mobil Yanbu Petrochemical Company ("Yanbu") and Exxon Chemical Arabia, Inc. ("ECAI"). We do not reach the foreign sovereign immunity question, however, because we determine that the *Rooker-Feldman* doctrine bars federal subject matter jurisdiction over the subsidiaries' claims, which have been already decided in state court.

I.

Facts and Procedural Posture

In 1980, SABIC and the Exxon (now ExxonMobil) subsidiaries formed two joint venture entities. One, called Yanpet, was the joint venture between SABIC and Yanbu, and another, called Kemya, was the joint venture between SABIC and ECAI. Two decades later, the parties began to dispute the propriety of royalties SABIC had charged to the joint venture entities for the sublicense to a polyethylene manufacturing method called the Unipol® process. In September 2000 SABIC sued Yanbu and ECAI in the Delaware Superior Court seeking a declaratory judgment that these royalty charges did not violate the joint venture agreements with Yanbu and ECAI. Later that same month ExxonMobil, Yanbu, and ECAI countersued SABIC in the United States District Court for the District of New Jersey (Civil Action No. 00-3841), seeking the converse declaratory judgment—that SABIC had overcharged the joint venture entities for the sublicense in violation of the joint venture agreements.

In January 2002, Yanbu and ECAI filed an answer to SABIC's state court complaint, asserting as counterclaims the same claims they had filed in their federal court complaint. In March 2003, after a two-week trial in the Delaware Superior Court, the jury returned a $416,880,764 verdict against SABIC in favor of ExxonMobil. SABIC has appealed the verdict, which is currently pending in the Delaware Supreme Court.

Prior to the state court trial, SABIC moved to dismiss ExxonMobil's federal court action, asserting foreign sovereign immunity. The District Court denied the motion on April 3, 2002. *Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378 (D.N.J. 2002). Though the order also addressed other issues in that action, SABIC appeals only from the sovereign immunity decision.

II.

Jurisdiction

A. Appellate Jurisdiction

We generally do not have jurisdiction to review interlocutory decisions such as the denial of a motion to dismiss. Under the collateral order doctrine,[1] however, we have recognized exceptions to this rule. One well-established exception is for orders denying motions to dismiss for reasons of immunity. *See, e.g., In re Montgomery County*, 215 F.3d at 373 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). Thus,

[1] The collateral order doctrine excepts a "narrow range" of interlocutory decisions from the general rule that only final orders are appealable. *In re Montgomery County*, 215 F.3d 367, 373 (3d Cir. 2000) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). To be an appealable collateral order, it must "conclusively determine the disputed issue, the issue must be completely separate from the merits of the action, and the decision must be effectively unreviewable on appeal from a final judgment." *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

we have appellate jurisdiction over the District Court's denial of SABIC's motion to dismiss based on sovereign immunity.

B. *Rooker-Feldman* Doctrine

Determining that appellate jurisdiction is proper in a case does not end our jurisdictional inquiry. We have a "continuing obligation to *sua sponte* raise the issue of subject matter jurisdiction when it is in question." *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 420 (3d Cir. 2003) (citing *Bracken v. Matgouranis*, 296 F.3d 160, 162 (3d Cir. 2002)). We focused at oral argument on whether federal subject matter jurisdiction over this case fails under the *Rooker-Feldman* doctrine because ExxonMobil's claims have already been litigated in state court. Aided by post-argument letter briefs submitted by the parties, we conclude the answer is yes.

The *Rooker-Feldman* doctrine, derived from two Supreme Court cases—*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)—prevents lower federal courts from "sit[ting] in direct review of the decisions of a state tribunal." *Gulla v. North Strabane Twp.*, 146 F.3d 168, 171 (3d Cir. 1998). Because Congress has conferred jurisdiction to review a state court's decision only on the Supreme Court, *see* 28 U.S.C. § 1257, lower federal courts lack the power to decide claims in which "the relief requested . . . requires determining that the state court's decision is wrong or . . . void[ing] the state court's ruling." *Desi's Pizza*, 321 F.3d at 419 (quoting *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996)). As we recently explained, "a claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to the filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" *Desi's Pizza*, 321 F.3d at 419 (quoting *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 325 (3d Cir. 2000)).

The state level decision need not be of its highest court. The *Rooker-Feldman* doctrine applies equally to final decisions of lower state courts. *FOCUS*, 75 F.3d at 840.

Here there is no dispute that ExxonMobil's claims are identical to the claims upon which the Delaware Superior Court reached a final judgment. Thus, though our Court takes a narrow view of the *Rooker-Feldman* doctrine, *Parkview Assocs. P'ship*, 225 F.3d at 326, litigating ExxonMobil's claims to final judgment in state court presents the "paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding." *E.B. v. Verniero*, 119 F.3d 1077, 1090-91 (3d Cir. 1997) (describing a case in which the federal court plaintiff sought an injunction directing that a state court order not be carried out).

ExxonMobil argues that the "actually litigated" circumstance does not trigger *Rooker-Feldman* because the March 2003 state court judgment was not reached prior to ExxonMobil's filing of the federal action in August 2000. It cites to *Desi's Pizza*, in which we said *Rooker-Feldman* bars a claim "if the claim was 'actually litigated' in state court prior to the filing of the federal action," 321 F.3d at 419. But we do not read this language as imposing a new requirement that, in order for the "actually litigated" trigger to apply, the plaintiff's federal claims must be filed *after* the state claims reach a final judgment. In deciding whether a claim was "actually litigated" in state court for *Rooker-Feldman* purposes, we have consistently looked to the substance of the state court's judgment compared to the plaintiff's claims in the federal action. *See Parkview Assocs. P'ship*, 225 F.3d at 325-36; *Gulla*, 146 F.3d at 173. Filing the latter before the state court judgment does not escape *Rooker-Feldman's* grasp. The only timing relevant is whether the state judgment precedes a federal judgment on the same claims. *Desi's Pizza* itself is illustrative because there the state court reached final judgment *after* the plaintiff filed claims in federal court. Yet

we decided that the plaintiff's claims were not "actually litigated" because neither its state court pleadings nor the state court's judgment discussed or referenced the claims it filed in federal court. If in *Desi's Pizza* we had intended to adopt a new requirement that the state court must reach a final judgment prior to the filing of the federal action in order for the "actually litigated" trigger to apply, we had a full opportunity to do so. Furthermore, were we to find that the *Rooker-Feldman* "actually litigated" trigger did not apply to federal actions filed prior to the state court's final judgment, we would be encouraging parties to maintain federal actions as "insurance policies" while their state court claims were pending. This defeats an "elementary principle" underpinning the *Rooker-Feldman* doctrine—"that a party's recourse for an adverse decision in state court is an appeal to the appropriate state appellate court, and ultimately the Supreme Court under § 1257, not a separate action in federal court." *Parkview Assocs. P'ship*, 225 F.3d at 324.

ExxonMobil also argues that *Rooker-Feldman* should not apply in this case because it is not a party to the action in Delaware state court, in which only its subsidiaries, Yanbu and ECAI, are defendants. Indeed, we have consistently (and recently) held that *Rooker-Feldman* does not bar claims of plaintiffs who were not parties to the state court proceeding. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 342 F.3d 242, 257 (3d Cir. 2003); *Marks v. Stinson*, 19 F.3d 873, 886 n.11 (3d Cir. 1994). But we have also noted that this limiting principle of the *Rooker-Feldman* doctrine "has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion." *Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992). Claims and issues decided against an entity bind also its parties in privity, including wholly-owned subsidiaries. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991). Underscoring this common sense privity principle is the fact that ExxonMobil's interest in its federal claims is identical to its subsidiaries' interest in their state

court claims, because its right to recover is derivative of its subsidiaries' right to recover. Indeed, both Yanbu and ECAI are co-plaintiffs with ExxonMobil in the federal action.

As ExxonMobil's federal claims were "actually litigated" in state court, we need not analyze whether, under the alternative prong of the *Rooker-Feldman* doctrine, they were "inextricably intertwined with a previous state court adjudication." *Parkview Assocs. P'ship,* 225 F.3d at 327. We simply note that our case presents an equally clear application of the "inextricably intertwined" circumstance, which exists when "federal relief can only be predicated upon a conviction that the state court was wrong," *id.* at 325, or when "the federal court must . . . take action that would render [the state court's] judgment ineffectual," *FOCUS*, 75 F.3d at 840. By its own admission, ExxonMobil seeks to maintain its federal action as an "insurance policy" in order to relitigate the overcharge issue if SABIC prevails in its efforts to overturn the state court verdict in favor of ExxonMobil. If that were to happen, ExxonMobil's federal action would squarely be seeking to invalidate a final judgment of the state court, the very situation contemplated by *Rooker-Feldman's* "inextricably intertwined" bar.

* * * * *

Because ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment, they are barred by the *Rooker-Feldman* doctrine. Even within our Court's narrow confines for *Rooker-Feldman,* this case is easily cabined. We cannot imagine a more classic invocation of the *Rooker-Feldman* jurisdictional bar than to preclude a party from maintaining a federal action as an "insurance policy" in case the state trial court decision in that party's favor is overturned by an appellate state court. We therefore vacate those aspects of the District Court's order addressing Civil Action No. 00-3841, the subject of this appeal, and remand with instructions to dismiss that action for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION; EXXON CHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v.

SAUDI BASIC INDUSTRIES CORPORATION
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 00-cv-03 841)
District Judge: Honorable William H. Walls

Argued December 9, 2003

Before: AMBRO, FUENTES and CHERTOFF, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on December 9, 2003.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that those aspects of the judgment of the District Court dated April 3, 2002 relating to Civil

Action No. 00-3841 are hereby vacated and ordered dismissed for lack of subject matter jurisdiction. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Kathleen Brower
Chief Deputy Clerk

Dated: March 24, 2004

Costs taxed in favor of Appellant, Saudi Basic Industries Corporation, as follows:

Appellant's brief	**$189.80**
Appellant's appendix	**411.40**
Appellant's reply brief	**146.40**
Sales tax	**55.64**
TOTAL	**$903.24**

Certified as a true copy and issued in lieu of a formal mandate on April 15, 2004

Teste: /s/_____
Acting Clerk, United States Court of Appeals
for the Third Circuit

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 98-4897 (WHW)

SAUDI BASIC INDUSTRIES CORPORATION, INDIVIDUALLY AND IN THE NAME OF, AND ON BEHALF OF, AL-JUBAIL PETROCHEMICAL COMPANY, A PARTNERSHIP,
Plaintiff,

v.

EXXONMOBIL CORPORATION,
Defendant.

Civil Action No. 00-3841 (WHW)

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., and MOBIL YANBU PETROCHEMICAL COMPANY, INC.
Plaintiffs,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

OPINION

Walls, District Judge

This is a complicated dispute concerning the alleged misuse of a patent and alleged overcharges of royalties to a

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partnership. In the first lawsuit, Civil Action No 98-4897 (WHW) ("NJ-I"), Plaintiff Saudi Basic Industries ("SABIC") moves to clarify or reform a March 10, 2000 Stipulation where it agreed not to practice a technology that is the subject of a patent dispute. SABIC also moves pursuant to Rule 12(c) for partial judgment on the pleadings to strike Defendant ExxonMobil's ("Exxon") defenses of unclean hands and setoff. Exxon cross-moves to dismiss the Complaint pursuant to Rule 19 for SABIC's failure to join necessary and indispensable parties. The motion for clarification or reformation of the March 10 Stipulation is denied; the motion for partial judgment on the pleadings pursuant to Rule 12(c) is also denied. Exxon's cross-motion to dismiss pursuant to Rule 19 is denied; SABIC is not required to join either ECAI or KEMYA as an indispensable party.

In the second lawsuit, Civil Action No. 00-3841 (WHW) ("NJ-II"), SABIC moves to dismiss the complaint of Exxon based on the Foreign Sovereign Immunities Act, as well as on other jurisdictional grounds. Exxon moves to consolidate the NJ-I and NJ-II actions into a single lawsuit. The motion to dismiss is denied; the motion to consolidate is granted.

FACTS AND PROCEDURAL BACKGROUND

The claims asserted in this action have their origin in the late 1970's. Because of the number of parties, at the outset it is useful to list them and their relationships to each other: SABIC is a Saudi Arabian corporation, owned 70% by the Saudi government and 30% by private investors, with its principal place of business in Saudi Arabia. Exxon is a New Jersey corporation with its principal place of business in Texas. Exxon Chemical Arabia, Inc. ("ECAI"), a Delaware Corporation with its principal place of business in Texas, is a wholly-owned subsidiary of Exxon Overseas Corporation, which itself is a wholly-owned subsidiary of Exxon.

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KEMYA is a 50/50 limited liability partnership formed between SABIC and ECAI under Saudi Arabian law to manufacture polyethylene. Mobil-Yanbu ("Yanbu") is a Delaware corporation with its principal place of business in Delaware.

In the 1970's, SABIC approached a number of potential partners about the possibility of forming joint ventures in Saudi Arabia to manufacture polyethylene. The negotiations culminated in the formations of two joint ventures in 1980; one with Yanbu, the other with ECAI. Exxon is not a direct party to either of these agreements.

The first joint venture was formed by SABIC and Yanbu on April 19, 1980, and created the Saudi-Yanbu Petrochemical Co. ("YANPET"). The second joint venture was entered into by SABIC and ECAI on April 26, 1980, and established the Al-Jubail Petrochemical Co. ("KEMYA"). Both YANPET and KEMYA are limited liability partnerships existing under the laws of Saudi Arabia, and in the business of manufacturing polyethylene in Saudi Arabia.

Exxon asserts that both joint venture agreements provide that the agreements, including their Annexes[1] "when executed", constitute the "'***whole agreement***' between the Partners . . ." (Joint Venture Agreement, Art. 18.1 (emphasis added)) So, according to Exxon, the December 22, 1980 Service Agreement that is the subject of the NJ-I action, is expressly incorporated into the joint venture agreements, creating a "single package" of rights and obligations. This overall scheme required participation by Exxon and Mobil

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[1] The December 22, 1980 Service Agreement is an annex to the Joint Venture Agreement. Clause 10.1 of the Service Agreement provides: "The Agreement shall continue its force as long as the Joint Venture Agreement ***(to which this Agreement is Annex VI)*** continues in full force and effect, or until a termination pursuant to Clause 11.1 of this Agreement." (emphasis added)

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(not just ECAI and Yanbu), and Exxon argues that all parties understood that Exxon and Mobil (now "Exxon") were intended to benefit from the joint venture agreements. SABIC strongly refutes this version of the facts and asserts that the Service Agreement and Joint Venture Agreements constitute separate agreements.

NJ-I Action

By its amended complaint, SABIC seeks a declaration that KEMYA has ownership rights in proprietary information, including trade secrets and U.S. Patent No. 5,352,749, by virtue of a December 22, 1980 Service Agreement between KEMYA and Exxon.

Pursuant to the Service Agreement, Exxon, acting through its unincorporated division Exxon Chemical Company ("ECC"), agreed to provide certain services to KEMYA from time to time, including engineering, administrative, and technical services related to construction of a petrochemical plant at Al-Jubail in Saudi Arabia. (Am. Compl. ¶ 11.) Under the Agreement, processes or patents developed as a result of services provided under the agreement were deemed the property of KEMYA, subject to royalty-free licenses given to Exxon and its affiliates. The Agreement is governed by Saudi Arabian law.

In 1991, in an attempt to expand the capacity of its Al-Jubail petrochemical facility in Saudi Arabia, KEMYA requested that Exxon conduct a study of the plant reactors' ultimate capacity ("the URC study"). (Am. Compl ¶¶ 19-21.) In connection with that request, Exxon was given access to proprietary information belonging to KEMYA. *Id.* ¶ 22. SABIC alleges that such access occurred "well prior to the filing of the last of the patent applications that led to the '749 patent." The URC study was completed by July 1991.

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SABIC claims that Exxon has improperly withheld the results of the URC study, as well as other aspects of KEMYA's operations, and violated the '749 patent. Further, SABIC alleges that in March 1992, Exxon filed an application for a patent concerning the subject matter of the URC study without authorization. In October 1994, the U.S. Patent and Trademark Office issued the '749 patent, entitled "Process for Polymerizing Monomers in Fluidized Beds," to the holding company Exxon Chemical Patents, Inc. ("ECPI") as assignee. That patent describes a method to increase polyethylene production through a process known as "Super Condensed Mode Technology" ("SCM-T"). SABIC charges that Exxon illegally licensed or otherwise conveyed rights in the '749 patent and other KEMYA trade secrets without permission.

In the NJ-I action, SABIC brings suit on behalf of KEMYA for breach of the Service Agreement and implied covenants, specific performance (delivery of the '749 patent and related trade secrets), misappropriation of trade secrets, conversion, tortious interference with prospective economic advantage, unfair competition, and unjust enrichment. SABIC has not joined the other partner, ECAI, as a plaintiff because in its view, ECAI as a subsidiary of Exxon, would not sue its related corporation.

SABIC claims that Exxon expressly acknowledged SABIC and KEMYA's right to contest Exxon's claim of ownership to the technology at issue here. (Am. Compl., Ex. A.) The NJ-I complaint alleges that SCM-T belongs to KEMYA, and that it was wrongfully misappropriated by Exxon. Exxon disputes this argument, and avers that it had a right to practice SCM-T. (Answer ¶ 10)

The NJ-II Action—Unipol License

On or about September 28, 1980, SABIC entered into an agreement with Union Carbide Corp. ("UCC"), to have the exclusive sublicense for a gas-phase process to manufacture polyethylene in Saudi Arabia. This technology is referred to as Unipol® process. In exchange for its exclusive license, SABIC pays UCC, among other things, a running royalty. (Del. Compl. ¶ 10.)

SABIC entered into two sublicense agreements with YANPET and KEMYA, effective October 15, 1980, which gave those partnerships the right to use Unipol process in their respective plants to manufacture polyethylene. Under the sublicense agreements, both partnerships were required to pay SABIC a running royalty.

In NJ-II, Plaintiffs Exxon, Yanbu and ECAI claim that SABIC overcharged the partnerships by collecting royalties at a higher rate than agreed upon (the "royalty overcharges").

The Delaware Action

On July 24, 2000, SABIC filed a complaint against Yanbu and ECAI in the Superior Court of Delaware (Civil Action No. OOC-07-161-VAB ("Delaware action"). SABIC's complaint seeks declaratory relief against these defendants solely on the issue of whether the royalty charges were proper under the joint venture agreements. As said, in NJ-II, Yanbu and ECAI have accused SABIC of "over-charging" both partnerships for royalties in violation of the joint venture agreements.

DISCUSSION

SABIC and Exxon sharply disagree as to the nature of their overall contractual arrangements. As mentioned, they entered into a joint venture agreement in April 1980. The parties agree on this basic point, but disagree on everything that

follows. According to Exxon, the joint venture agreement served as an overall operating agreement for the parties, incorporating any future agreements or amendments. SABIC denies this and argues that the April 26, 1980 Joint Venture Agreement, the subject of NJ-II, and the December 22, 1980 Service Agreement, the subject of NJ-I, are separate and distinct and should not be joined in the same action. The Court now sets forth the most plausible nature of the parties contractual relationship, for that determination guides much of the analysis to follow.

The April 1980 Joint Venture Agreement entered into by SABIC and ECAI described the parties' multiple responsibilities for the partnership arrangement to manufacture polyethylene in Saudi Arabia. The Court agrees with Exxon and finds that the Joint Venture Agreement provided the overall contractual arrangement between the parties. This view is enforced by Article 18.1 of the Joint Venture Agreement,[2] which clearly states that the Joint Venture Agreement includes "[a]nnexes hereto, when executed" which constitute the "whole agreement" between the parties. The Joint Venture Agreement supersedes any other agreement or correspondence between the parties. Because the December 22, 1980 Service Agreement is "Annex VI" to the April 26, 1980 Joint Venture Agreement, it becomes part of the whole agreement between the parties. (Dec. 22, 1980 Service Agreement ¶ 10.1.)

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[2] See Joint Venture Agreement Between Saudi Basic Industries Corporation and Exxon Chemical Arabia, Inc., Art. 18.1, "This Joint Venture Agreement, including the Annexes hereto, when executed, constitute the **whole agreement** between the Partners as to the matters herein set out and accordingly **supersedes any previous agreement or correspondence** between the Partners and any other related letters/agreements." (emphasis added)

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With this in mind, the Court now analyzes each of the six motions brought by the parties in the NJ-I and NJ-II cases.

1. Motion to Clarify or Reform the March 10, 2000 Stipulation

SABIC seeks to clarify, and if necessary, reform the March 10, 2000 Stipulation ("March Stipulation") wherein it agreed not to practice SCM-T. SABIC seeks permission for its affiliated plants to operate at the lower range of the super-condensed mode, namely an allowable usage of up to 22 wt. % condensed phase when manufacturing polyethylene.

The March 10, 2000 Stipulation

The March Stipulation arose from SABIC's motion to dismiss Count IV of Exxon's Amended Counterclaims: Exxon accused SABIC of breaching its fiduciary duty to KEMYA by encouraging certain SABIC affiliates, including SHARQ, to use SCM-T. SABIC moved to dismiss, and contended that it had not conveyed SCM-T information to affiliates, and that none, including SHARQ, had any intention of using SCM-T without proper authorization. Exxon agreed to a dismissal of Count IV's counterclaims based on SABIC's representations in the March 10, 2000 Stipulation which was signed as an Order of this Court on April 3, 2000.[3]

[3] In the March 10, 2000 Stipulation (later the April 3, 2000 Order), SABIC represented to Exxon that, "[n]either SABIC, SHARQ, Yanpet . . . nor any SABIC affiliate (other than KEMYA) have used or practiced SCM-T Information. SABIC further represents that neither SABIC, SHARQ, Yanpet . . . nor any other SABIC affiliate (other than KEMYA) will use or practice the SCM-T Information until the ownership rights thereto are established and the owner expressly authorizes such use . . . ." Whether the Stipulation should have been signed as an Order of the Court is the subject of a separate motion.

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Univation Agreements

In April 1997, Exxon and UCC had formed a 50/50 joint venture, Univation, to commercialize, license and enforce SCM-T patents held by Exxon. The parties expressly agreed that SABIC could operate its recycle gas phase at or below 22 wt. %. (Agozzino Decl., Ex. A ¶ 12.02.) Schedule 12.02 identifies "SABIC" as the exempt licensee. (*Id.* at Schedule 12.02.)

According to SABIC, its management was unaware of the Univation Agreements and the fact that SABIC and its affiliates had been formally granted the right to practice "up to" 22 wt. % condensed. (Dr. Al-Ubaid Decl., ¶¶ 12, 13).

SABIC contends that as a result of this agreement, Exxon and UCC had covenanted between themselves and for Univation, that a limited portion of SCM-T patent rights (up to 22 wt. % condensed) would not be enforced by Univation against SABIC and its affiliates. SABIC's management later learned of the existence of these agreements.

Exxon contends that the Univation Agreements are immaterial to the present dispute and were produced long before the March Stipulation. According to Exxon, SABIC knew of the Univation Agreements before the Stipulation, and cannot now claim ignorance. In addition, "before summer", Dr. Al-Ubaid of SABIC knew of SHARQ's plans to practice over 17.4 wt. %. (Exxon Mem. In Opp'n to Mot. to Clarify ("Exxon Br.") at 8, *citing* 10/28/00 Al-Ubaid Dep. at 666.) However, SABIC did not notify Exxon or the Court of the breach of the March Stipulation.

Exxon argues that the Univation Agreements, despite assertions by SABIC, do not permit SABIC or SHARQ to operate between 17.4 and 22 wt. % condensed. Exxon argues: (1) that Schedule 12.02 of the Univation Agreements does not make any reference to SABIC's affiliates; (2) ¶ 12.02 of

the Univation Agreements does not apply to SCM-T information at or below 22 wt. %; (3) nothing in the Univation Agreements (or in the law) supports SABIC's interpretation that SABIC or SHARQ is a ~~third~~-party beneficiary; (4) ¶ 12.02 of the Agreements is neither a license nor a covenant not to sue. According to Exxon, the Univation Agreements are agreements between Univation and UCC and provide that Univation will not enforce the SCM-T patents in certain situations.

Permission to Use SCM-T up to 22 wt. %

Despite this Court's April 3, 2000 Order, SHARQ switched to higher condensed phase operations to cool its recycle gas. SHARQ decided to run plant tests up to 22 wt. % condensed as permitted by the Univation Agreements (but forbidden by the April 3 Order). SABIC claims that it did not know of SHARQ's plans until after the April 3 Order was executed.

SABIC then sought permission from KEMYA for SHARQ to operate at 22 wt. % because of its concern that KEMYA might be declared the owner of SCM-T instead of Exxon. Mr. Alaudah, the president of KEMYA, gave such permission (in exchange for a royalty) pending the outcome of this case. (*See* Exxon's Decl. of Elizabeth J. Sher ("Sher Decl."), Ex. P)

Based on that permission, on August 1, 2000, SHARQ began running tests at levels up to 22 wt. %. The tests were apparently successful, because SHARQ started operating regularly at these levels. (Al-Ubaid Decl. ¶ 20). SABIC argues that the sole purpose of the March Stipulation was to preclude any basis for an accusation that SABIC had made or was planning to make some unauthorized use of SCM-T information transferred improperly from KEMYA. SABIC argues that the phrase "until ownership rights thereto are established" was included because SABIC did not then envision any possibility of such authorization being obtained until

the litigation was resolved. SABIC believes that it has fully complied with the March 10 Stipulation and this Court's April 3 Order by obtaining contractual authority from everyone who could be an owner of the technology. SABIC states that no SCM-T information has been transferred to SHARQ. As a result, SABIC seeks to reform or clarify the Stipulation to reflect SHARQ's right to practice SCM-T information up to 22 wt. % condensed. The March Stipulation and April 3 Order are silent about SHARQ's right to practice up to 22 wt. % condensed. At that time, SHARQ had informed SABIC that it did not intend to practice over 17.4 wt. % condensed. SABIC now cites a "business need" to practice SCM-T up to 22 wt. % condensed, and seeks a clarification and reformation of the stipulation to reflect this.

Exxon's Argument

Exxon argues that the March Stipulation should not be clarified or reformed for several reasons. First, Exxon says that SABIC was and is violating the March Stipulation by allowing its affiliate, SHARQ, to practice SCM-T information before ownership is determined. Exxon also argues that SABIC's argument that the Univation Agreements allowed other parties to use the technology only matters if SABIC *loses* this case, because if KEMYA owns SCM-T information as SABIC contends in this lawsuit, then Univation or any other entity could not grant permission to use the technology.

Exxon alleges that in seeking "permission" for SHARQ to operate up to 22 wt. % condensed, SABIC engaged in improper *exparte* contacts with Mr. Alaudah. This was the subject of a series of submissions and hearings in August and September 2000 before Special Master Weiss on the subject of breach of the parties' agreement to avoid *exparte* contacts about the litigation with KEMYA employees. Exxon says that throughout these proceedings, SABIC failed to disclose

its contacts with Mr. Alaudah and its imminent plans to practice SCM-T.

SABIC has defended SHARQ's secret contacts with Mr. Alaudah, claiming that such contacts were "not related to the litigation," even though it now places these communications before the Court as evidence to justify the relief it seeks.

1. The March Stipulation Prohibits SHARQ's Use of SCM-T Information and Is Enforceable.

The March Stipulation is clear on its face as to the representations of SABIC: ". . . neither SABIC, SHARQ, YANPET, Petrokemya, nor any SABIC affiliate (other than KEMYA) will use or practice the SCM-T Information until the ownership rights thereto are established and the owner expressly authorizes such use." (March 10, 2000 Stip., 2) This Court disagrees with SABIC's assertion that the March Stipulation is ambiguous with regard to SHARQ's right to practice SCM-T Information.

SABIC's arguments that the Univation Agreements create rights for SABIC and its affiliates with regard to the SCM-T information are problematic for several reasons. First, there is little reason to believe that the Univation Agreements were not available for review by SABIC before SABIC and Exxon entered into the March Stipulation. The documents were produced to SABIC four months before the March Stipulation. The Protective Order did not prevent a business designee from having access to these agreements. (See Sher Aff., Ex. E.) Therefore, this Court finds that SABIC's proclaimed ignorance of the terms within the Univation Agreements is unreasonable and suspect.

Also, it is unclear whether Schedule 12.02 of the Univation Agreements granted SHARQ rights to practice SCM-T information. Schedule 12.02 of the Agreement does not explicitly include SABIC's affiliates and SABIC has not asserted a

compelling reason to find that the contract should be interpreted to include its affiliates.

Last, assuming that the Univation Agreements afforded rights to SHARQ to practice SCM-T information, Section 12.02 of these agreements was a statement of present intent between UCC and Exxon. There was nothing to preclude these two parties from amending the terms of the agreements so as to allow Univation to enforce the patents against SABIC.[4] This Court does not find the March Stipulation to conflict with the terms of the Univation Agreements. By the March Stipulation, SABIC agreed that SABIC and its affiliates would not use or practice the SCM-T Information until ownership rights were established and the owner expressly authorized such use. Exxon and UCC's earlier agreement not to enforce patent rights against SABIC does not relieve SABIC of its obligations under the March Stipulation. This Court finds that the March Stipulation is an unambiguous and enforceable agreement.

2. SABIC has failed to Demonstrate Permission.

SABIC has also failed to demonstrate permission for use of the SCM-T information. KEMYA's ownership is far from certain. It is unclear that the President of KEMYA, Mr. Alaudah's, grant of permission to SHARQ for use of the SCM-T information was proper.

Exxon argues that the documents governing KEMYA's operations require Board approval for any offer to sell or

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[4] SABIC argues that SABIC and its affiliates are third-party beneficiaries to these agreements. The question of whether SABIC and its affiliates were intended beneficiaries by the contracting parties will not be explored in this opinion. It is enough that the contracting parties had the ability to change the terms of the agreement according to their present intent and that the March Stipulation does not conflict with the terms of the Univation Formation Agreement to determine this motion.

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dispose of property of the Partnership. Mr. Alaudah, president of KEMYA, did not disclose his discussions with SABIC to the other partner, and in doing so, failed to follow KEMYA's approval processes. This Court finds that SHARQ did not receive proper permission to practice the SCM-T information.

3. No Justification to Clarify or Reform the Stipulation.

There is substantial reason to deny clarification or reformation of the stipulation: SABIC's motion offers no legal basis to justify reformation. Contract law generally allows reformation only where necessary "to express the agreement [the parties intended.]" Restatement (Second) of Contracts § 155 (1979). While "mutual mistake" can justify reformation, unilateral mistake cannot. See In Re Resorts International, 181 F.3d 505, 512 (3d Cir. 1999) ("'unilateral mistake of a fact unknown to the other party is not ordinarily grounds for avoidance of a contract.'"); see also Coca-Cola Bottling Co. v. Elizabethtown, Inc. v. Coca-Cola Co., 988 F.2d 386, 404 (3d Cir. 1993), *cert. denied*, 510 U.S. 908, 114 S.Ct. 289, 126 L.Ed.2d 239 (1993) (same). SABIC has neither raised the issue of mutual mistake, nor plead any facts of mutual mistake about the meaning of the March 10, 2000 Stipulation.

Although there is an exception to the general principle denying relief for unilateral mistake when the non-mistaken party "'knows or has reason to know of the unilateral mistake'". In re Allegheny International, Inc., 954 F.2d 167, 180 (3d Cir. 1992) (citations omitted), here SABIC has not plead any facts of its "unilateral mistake", much less Exxon's knowledge of any unilateral mistake. Moreover, modification of a consent order "should not ordinarily be granted 'where a party relies on events that actually were anticipated at the time it entered into a decree.'" Building & Constr. Trades Council of Philadelphia & Vicinity, AFL-CIO v. NLRB, 64 F.3d 880, 886 (3d Cir. 1995)(quoting *Rufo v. Inmates of*

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Suffolk County Jail, 502 U.S. 367, 385, 112 S.Ct. 748, 760, 116 L.Ed.2d 867(1992)).

This Court denies SABIC's motion to clarify or reform the March 2000 Stipulation because legal justification is absent. Unilateral mistake is not a basis for reformation of an Order. Since August 1, 2000, SABIC has been violating the April 3 Order by allowing SHARQ to practice SCM-T at levels of 22 wt. % condensed. A "business need" even if substantiated, is not a sufficient reason to ignore a Court Order. Because SABIC's motion is denied, Exxon's motion for expedited discovery on this issue is mooted.

2. SABIC'S RULE 12(C) MOTIONS TO STRIKE "UNCLEAN HANDS" AND "SET OFF" DEFENSES

In the second of its NJ-I motions, SABIC moves to strike, pursuant to Fed. R. Civ. P 12(c), Exxon's unclean hands and "set-off" defenses because these defenses are allegedly based on a separate agreement.

A. Standard of Review

A motion for judgment on the pleadings under Rule 12(c) is appropriate when the moving party establishes on the face of the pleadings that it is entitled to judgment as a matter of law. Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988); Soc'y Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980). The motion must be denied "'unless the movant clearly establishes that no material issue offset remains to be resolved and that he is entitled to judgment as a matter of law.'" Ilan-Gat Eng'rs, Ltd. v. Shelter Sys. Corp., 879 F.Supp. 416, 419 (D.N.J. 1994) (quoting Haves v. Cmty. Gen'l Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991)). The movant carries the heavy burden of establishing beyond doubt that "no relief can be granted under any set of facts that could be proved." Taj Mahal

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Travel, Inc. v. Delta Airlines, 164 F.3d 186, 189 (3d Cir. 1998); Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991)

In reviewing a 12(c) motion, the court must accept the nonmovant's allegations as true and view the facts and inferences in the light most favorable to the nonmoving party. Jablonski, 863 F.2d at 289-90; Ilan-Gat Eng'rs., 879 F.Supp. at 419.

B. Arguments

Exxon first argues that because SABIC is relying on matters outside the pleadings, the summary judgment standard should be applied. However, because in motions for judgment on the pleadings, the Court may consider the pleadings and any written instruments attached as exhibits, there is no need for conversion. Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998). The Court may also consider any documents referred to in the pleadings, including any undisputedly authentic documents that the claim or defense is based upon. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n. 9 (3d Cir. 1993).

Because SABIC has relied on the contents of Exxon's pleadings, together with the documents expressly referenced therein, these motions will be analyzed under Rule 12(c).

1. The Unclean Hands Defense Relates to the Joint Venture Agreement.

Under general principles of equity, "'[a party] who comes into equity must be with clean hands." Heuer v. Heuer, 152 N.J. 226, 238 (1998). Where a party has unclean hands with regard to the transaction at issue, the party cannot invoke the equitable powers of the Court. See id.

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SABIC relies on the argument that Exxon's "unclean hands" defense arises out of two separate agreements between different sets of parties, with the crux of the NJ-I lawsuit being Exxon's alleged breach of the December 22, 1980 Service Agreement. In response, Exxon asserts that SABIC acted with "unclean hands" in allegedly overcharging KEMYA for royalty payments based on the October 15, 1980 agreement ("royalty overcharges"[5]). SABIC says that Exxon cannot do this because the agreements described above are separate agreements.

As discussed above, this Court has determined that the NJ-I and NJ-II actions arise from one overall agreement. From that, the Court agrees with Exxon that SABIC has not met the high burden of establishing that relief could not be granted under any set of facts. SABIC's argument that the unclean hands defense should be stricken because it relates to a separate agreement is rejected.

2. Unclean Hands Defense Must Relate to Subject Matter of Complaint.

The unclean hands defense must relate closely to the subject matter of the complaint. In re New Valley Corp., 181 F.3d 517, 525 (3d Cir. 1999) ("the alleged inequitable conduct must be connected, i.e., have a relationship to the matters before the court for resolution"), *cert. denied*, 528 U.S. 1138, 120 S.Ct. 983, 145 L.Ed.2d 933 (2000). Properly viewed, the equitable maxim of unclean hands is a tool for the court, rather than a defense for the accused. Sears, Roebuck

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[5] The royalty overcharge claims are the subject of two other actions. One, pending before this Court, ExxonMobil Corp. v. SABIC, (00-3841), is the subject of a motion to dismiss for lack of jurisdiction. The other is pending before the Superior Court of Delaware, Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co. (Civil Action No. OOC-07-161-VAB) which Exxon seeks to dismiss.

& Co. v. Sears Plc., 744 F.Supp. 1297, 1309 (D. Del. 1990) ("In actuality, a defendant's claim of unclean hands . . . is not a defense at all. When presented with a claim of unclean hands, the court is primarily concerned with protecting its own integrity . . . ") The doctrine only comes into play when it is evident from the pleadings that the allegedly improper conduct is ***directly related*** to the conduct about which plaintiff complains, because only in such circumstances is the Court's equitable power implicated. New Valley, 181 F.3d at 525.

SABIC asserts that the contractual provision upon which Exxon bases its defense is separate, distinct and independent of the breach of contract claim raised by SABIC. When a party's equitable defense is not based upon a purported breach of a contractual provision at issue, such a defense may not serve to bar plaintiff's claims. See Laborers' Int'l Union of North Am. v. Foster Wheeler Corp., 26 F.3d 375 (3d Cir. 1994) (suit to compel arbitration under pre-hire agreement not barred by unclean hands because unclean hands premised on breach of different contractual provision).

However, this Court finds that there is a close enough relationship between the inequitable conduct and the claims in the lawsuit to give Exxon the opportunity to assert the defense. SABIC has not met its heavy burden of establishing beyond doubt that, "no relief can be granted under any set of facts that could be proved." Taj Mahal Travel, 164 F.3d at 189. The Court has already found that the Service Agreement and Unipol Agreement are part of the overall Joint Venture Agreement. The allegation by Exxon that SABIC has overcharged the joint venture in violation of the Joint Venture Agreement is conduct related to the breach of the same Joint Venture Agreement. SABIC's alleged unclean hands in overcharging the joint venture in NJ-II are directly relevant to its effort in NJ-I to invoke this Court's equitable powers and

enforce obligations supposedly owed by Exxon. This alleged conduct by SABIC could be considered unconscionable conduct that permeates the transaction as a whole. See Shell Oil v. Marinello, 120 N.J. Super. 357, 392 (N.J.Super.L. 1972) ("It is the effect of the inequitable conduct on the total transaction which is determinative whether the [unclean hands defense] shall or shall not be applied.").

3. Unclean Hands Defense Must Relate to the *Party* Alleged to Have Committed Wrongdoing.

SABIC's additional argument as to why the unclean hands defense should be stricken is that KEMYA is the real party in interest and the unclean hands defense is against SABIC. Because the unclean hands defense must relate to the *party* seeking that equitable relief, SABIC alleges that the unclean hands defense is improper.

Exxon argues that because SABIC is suing on behalf of KEMYA, there are no other partners against whom to assert the unclean hands defense. Even if KEMYA is innocent, SABIC's unclean hands would prevent it from suing derivatively on KEMYA's behalf. See Gaudiosi v. Mellon, 269 F.3d 873, 882 (3d Cir. 1959); Recchion v. Kirby, 637 F.Supp. 1309, 1315-16 (W.D. Pa. 1986) (holding that a shareholder with unclean hands cannot sue derivatively).

If SABIC as a derivative shareholder suing on behalf of KEMYA is found to have unclean hands, the Court finds that this wrongful conduct would bar SABIC from bringing the claims at issue. This view is well-established in case law. Recchion applied the doctrine of unclean hands to prevent plaintiff shareholder in a derivative action from complaining about the very conduct which he facilitated. The close connection between the plaintiff's own wrongful conduct and the wrongful conduct which was the basis of the derivative suit allowed the unclean hands defense to go forward. Id. at

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1315-16. Similarly, in Gaudiosi, in a derivative action for equitable relief related to a disputed proxy contest, the wrongful conduct of one of the contestants in intimidating the other stockholders abstain from voting their shares allowed an unclean hands defense. Gaudiosi, 269 F.3d at 882.

4. Exxon's Standing to Assert the Royalty Overcharge Claim as Its Unclean Hands Defense

SABIC's final argument in support of its motion to strike the unclean hands defense is that Exxon lacks standing to assert the royalty overcharge claim because it is neither a party nor a third-party beneficiary of the Joint Venture Agreement between SABIC and ECAI. The Court dismisses this argument for the reasons expressed in the following discussion of the setoff defense.

C. Setoff Defense

SABIC incorporates its previous New Valley argument that the lack of a close nexus between the defense and the complaint requires dismissal of the "setoff" defense and offers other arguments.

Setoff is a procedural device to allow a party to reduce the amount owed to an opposing party by the value of the opponent's cross-obligations to that party. U.S. v. York, 909 F.Supp. 4, 9 (D.D.C. 1995). "[A]party can have . . . setoff rights only against one asserting claims against himself." Nashville Lodging Co. v. Resolution Trust Corp., 59 F.3d 236, 246 (D.C. Cir. 1995). The common law right of setoff is permissive, not mandatory. See In re Monongahela Rye Liquors, 141 F.2d 864, 869 (3d Cir. 1944). It cannot be invoked when the general principles of equity would not justify it. York, 909 F. Supp. at 8.

The right to a setoff depends on the existence of mutual debts between the parties to the litigation. Id. at 9.; see also,

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In the Matter of Bevelli, Bressler & Schulman, 896 F.2d 54, 57-58 (3d Cir. 1990) ("The right of setoff depends on the existence of mutual debts and claims between creditor and debtor."). In other words, direct privity of contract is required before any setoff may be claimed. York, 909 F.Supp. at 9.

1. SABIC's Arguments

a. Privity Required for "Setoff" Defense

According to SABIC, Exxon lacks standing to assert a setoff for the alleged royalty overcharges, losses and damages suffered indirectly by ECAI, because Exxon was neither a party to the Univation Agreement, nor to the Joint Venture Agreement. The overcharges, even if proved, cannot create any obligation by SABIC to pay Exxon. In this situation, a setoff is barred. Capuano v. U.S., 955 F.2d 1427, 1430 (11th Cir. 1992) ("It goes without saying that neither party may offset moneys in its hands belonging to some other party.").

b. Disagreement About Exxon's Third-Party Beneficiary Status

SABIC also argues that Exxon lacks standing to assert "setoff" because it was not an intended third-party beneficiary of the KEMYA joint venture. For Exxon to have standing, it must demonstrate that it was an intended third-party beneficiary of the KEMYA joint venture. Grant v. Coca-Cola Bottling Co., 780 F.Supp. 246, 248-49 (D.N.J. 1991) ("[i]n order to qualify as a third-party beneficiary, the claimant must show that the contract was 'made for the benefit of [that] party within the intent and contemplation of the contracting parties") (citations omitted). It must be more than "mere knowledge" that some third-party may incident-tally benefit; rather, it must be a "motivating factor." See Grant, 780 F.Supp. at 249.

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According to SABIC, not only has Exxon failed to plead the required facts, but has failed to demonstrate any basis for its standing to assert a setoff based on the alleged royalty overcharge, except to assert its corporate parent status of ECAI, the true party in interest. However, ECAI, says SABIC, is an independent corporation, created under Delaware law, and a wholly owned subsidiary of Exxon Overseas Corp., an independent corporation, which is in turn a subsidiary of ExxonMobil. Exxon disputes this, and claims that it owns 100% of both companies, and therefore is the true "party-in interest."

Although Exxon is a grandparent company of ECAI, the corporate relationship, in and of itself, is not enough to confer standing. As a matter of law, Exxon as a distant parent to ECAI cannot demonstrate that it is an intended beneficiary because any benefit it receives as a parent (such as profits earned by the subsidiary) is indirect and incidental. See Dow Corning v. Chem. Design, Inc., 3 F.Supp.2d 361, 365-66 (W.D.N.Y. 1998). If Exxon cannot prosecute the royalty overcharge claim directly, it cannot do so indirectly by an affirmative defense or setoff.

Consequently if SABIC has overcharged KEMYA, any refund is owed to KEMYA, not to Exxon, a non-party to the Unipol transaction upon which the royalty overcharge claims are based. Such are the arguments of SABIC.

2. Exxon's Argument: SABIC has not met its burden

Exxon counters that SABIC's motion for partial judgment on the pleadings to dismiss Exxon's setoff defense must be denied absent a showing that Exxon can prove no set of facts that would sustain the defense.

Although Exxon asserts that it was an intended third-party beneficiary, it does not directly answer SABIC's charge that a grandparent is not a third-party beneficiary *per se*. See

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In re Bacigalupi, Inc., 60 B.R., 442, 446 (B.A.P. 9th Cir. 1986) (stating that a setoff claim 'cannot fail for lack of mutuality' where complaint in other acts *alleges* third-party beneficiary status)

Exxon avers that its allegations as a third-party beneficiary suffice for purposes of this motion. See Ilan Gat Eng'rs, 879 F.Supp. at 419. Exxon has expressly pled its third-party status (NJ-II Compl. ¶ 28), and argues that this suffices for its designation as a third-party beneficiary. See Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F.Supp. 1247, 1252 (D.N.J. 1995) (considering pleadings filed in other courts for purposes of 12(b)(6) motion).

Exxon argues that even beyond the pleadings, the facts demonstrate that it is a third-party beneficiary because the agreement names Exxon, and operates to its benefit. See ESI, Inc. v. Coastal Corp., 61 F.Supp.2d 35, 73-74 (S.D.N.Y. 1999) (holding that, although defendant was not a signatory to joint venture agreement, plaintiff could bring breach of contract claim against defendant where defendant participated in contract negotiations and drafting and had obligations related to joint venture).

Finally, Exxon argues that any questions of fact as to Exxon's third-party status cannot be resolved on a 12(c) motion, or a motion for summary judgment. See Pension Fund-Mid Jersey Trucking Indus.–Local 701 v. Omni Funding Group, 731 F.Supp. 161, 171 (D.N.J. 1990) (denying motion for summary judgment in view of issues of fact of "whether parties were intended beneficiaries of contract"); see also Consolidated Rail Corp. v. Portlight, Inc., 188 F.3d 93, 98 (3d Cir. 1999) (denying 12(c) motion where pleadings contained no information on the factual question, and the factual record was still undeveloped).

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3. Conclusion

The Court finds that for purposes of this motion, Exxon's allegations of its third-party beneficiary status must be accepted and finds that Exxon has sufficiently pled its third-party status. This Court agrees with Exxon and finds that a question of fact as to Exxon's third-party status cannot be resolved on a 12(c) motion for summary judgment. It is sufficient now for Exxon to have plead its third-party beneficiary status. The Court denies SABIC's Rule 12(c) motion.

3. Exxon's Motion to Dismiss Pursuant to Rule 19

In the third NJ-I motion, SABIC purports to bring derivative claims on behalf of KEMYA asserting that Exxon is obligated under contract and tort law to assign the rights of SCM-T information to KEMYA. Yet, SABIC has failed to name ECAI, the other partner in KEMYA, as a defendant. Exxon disputes SABIC's right to sue derivatively on KEMYA's behalf, and has preserved its defenses related to SABIC's failure to name either KEMYA or ECAI as indispensable parties. Exxon now moves to dismiss SABIC's derivative claims pursuant to Fed. R. Civ. P. 19 for failure to join a necessary and indispensable party. Alternatively, Exxon requests that this Court grant SABIC a 14-day leave to cure its defective pleading by adding ECAI as a defendant.

Rule 19 sets out separate tests for determining whether a party is "necessary"[6] and "indispensable."[7] If the court finds

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[6] See Fed. R. Civ. P. 19(a):

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction . . . shall be joined as a party in the action if (1) **in the person's absence complete relief cannot be accorded** . . . (2) the person claims an interest . . . and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties

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that a party is a "necessary one," it should direct the plaintiff to amend its complaint to add the person. Failure to comply with such an order may result in dismissal of the plaintiff's action. See Window Glass Cutters League of Am., AFL/CIO v. Am. St. Gobain Corp., 428 F.2d 353, 354 (3d Cir. 1970); Rainville Co. v. Consupak, Inc., 407 F.Supp. 221, 225 (D.N.J. 1976). When joinder is not feasible, the action must be dismissed if the unnamed person is "indispensable." Courts which analyze joinder fully consider each factor listed in Rules 19(a) and 19(b) to determine whether joinder or dismissal is required. See Provident Tradesmens Bank v. Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S.Ct. 733, 741 (1968).

Exxon complains that SABIC has not named either ECAI or KEMYA as a defendant. SABIC responds that Exxon and ECAI are effectively the same entity because Exxon stands in ECAI's shoes. SABIC alleges that its failure to add ECAI is justified by the futility of asking ECAI to "sue its parent or

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> subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . .
>
> (emphasis added)

[7] See Fed. R. Civ. P. 19(b):

> If a person described in subdivision (a)(1)-(2) . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, . . . the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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otherwise take action contrary to Exxon's interests." (First Am. Compl. ¶9).

In derivative actions, a plaintiff should name the real party in interest to prevent the risk of dismissal.[8] Cases have applied the same rule to partnerships and have dismissed derivative claims when the partnership was an absent party. See Bankston v. Burch, 27 F.3d 164, 167 (5th Cir. 1994) ("the partnership is . . . an ***indispensable*** party without whom the lawsuit should not go forward.").

In the Third Circuit, however, the rule has been modified such that "at least in certain cases, it is possible that a partnership's interest can be effectively represented in litigation by participation of its partners." HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1193 (3d Cir. 1996).

In general, federal courts are extremely reluctant to grant motions to dismiss based on nonjoinder, and dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result. See Provident Tradesmen Bank & Trust, 390 U.S. at 118, 88 S.Ct. at 743 ("To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him."), With that in mind, the Court will determine whether ECAI or KEMYA are necessary and indispensable parties.

[8] See 7 Charles Alan Wright, et. al., *Federal Practice and Procedure* § 1615, at 230-31 (2d. Ed. 1986) (the corporation on whose behalf a derivative action is brought is a necessary party upon which any decision is binding."); see also, Ross v. Bernard. 396 U.S. 531, 538 (1970) (quote)

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A. Is Either ECAI or KEMYA[9] a "Necessary Party" under Rule 19(a)?

SABIC argues that KEMYA is not a necessary party because it meets none of the criteria of Rule 19(a): first, Kemya is not a party in whose absence "complete relief cannot be accorded." Fed. R. Civ. P. 19(a)(1). A decision in favor of SABIC (acting derivatively) for KEMYA would restore the misappropriated asset to KEMYA, and end this dispute. Alternatively, a decision in favor of Exxon would end the dispute by binding SABIC, KEMYA, and ECAI. KEMYA cannot file another claim without SABIC's express authorization, and a binding decision upon SABIC precludes this possibility. Also, ECAI is the only other partner, and it will not take action against its parent. Ono v. Itoyama, 884 F. Supp. 892, 899 (D.N.J. 1995) ("The Court may presume a 50% shareholder would not agree to initiate litigation against himself."). In SABIC'S view, there can be complete relief without naming ECAI or KEMYA as defendants. This Court agrees with SABIC's argument.

Next, SABIC argues that the absent party's ability to protect its interest is not prejudiced. Federal Rule of Civil Procedure 19(a)(2) is intended to either allow an absent party to protect its interests in the event they differ from the parties already in the litigation, or to ensure that the existing parties adequately represent interests of the absent party. Also, joinder is not required when the party, even if joined, could not protect its own interests. Exxon's control over ECAI, coupled with the absence of any other partner to act on

[9] For purposes of this motion, the reader should assume that arguments regarding the addition of KEMYA as a party would also apply to arguments for adding ECAI as a party. This Court will not continue to reference both throughout this motion.

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KEMYA's behalf, thwarts KEMYA's ability to act independently, so KEMYA is not prejudiced by its absence.

Rule 19(a)(2)(ii) provides that when non-joinder of the absent party could subject the other parties to "multiple, double, or otherwise inconsistent lawsuits", joinder is necessary. Hagstrom v. Breutman, 572 F.Supp. 692, 701 (N.D. Ill. 1983). It should be noted that Rule 19 protects only against inconsistent obligations, not inconsistent adjudications. See RPR & Assoc. v. O'Brien/Atkins Assoc., P.A., 921 F.Supp. 1457, 1464 (M.D.N.C. 1995). The Third Circuit agrees that Rule 19 is not triggered merely by inconsistent adjudications. See Field v. Volkswagenwerk AG, 626 F.2d 293, 301-02 (3d Cir. 1980). (The mere risk that a defendant who has successfully defended against a party may be found liable to another plaintiff in a subsequent action does not necessitate joinder of all of the parties in one action.)

SABIC argues that there is no scenario under which ECAI could be exposed to inconsistent obligations: There are only two partners in KEMYA, ECAI (owned and controlled by Exxon) and SABIC. Because KEMYA cannot act without SABIC's express authorization, there is no risk of multiple lawsuits or inconsistent obligations.

Exxon counters that SABIC does not represent KEMYA's interests. Exxon points to three instances when SABIC's and KEMYA's interests have conflicted. First, SABIC offers SCM-T as a major advance over Unipol® technology, and asserts that it would have the automatic right to freely use and sublicense SCM-T, if it is determined to be owned by KEMYA. This conflicts with the spirit of the Unipol Agreement between SABIC and KEMYA, which allows KEMYA to license its major advances to SABIC and UCC, without allowing SABIC to sublicense them further. (SABIC/KEMYA UCC License XI.9, Sher Aff., Exh. C).

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SABIC is advancing a position that conflicts with KEMYA's interests, says Exxon.

Second, SABIC earlier conceded that SHARQ, its half-owned affiliate, and a direct competitor of KEMYA, is currently using SCM-T, in violation of the March Stipulation that "neither SABIC, SHARQ, YANPET, PetroKEMYA, nor any SABIC affiliate (other than KEMYA) will use or practice the SCM-T information until ownership rights are established." According to Exxon, SABIC's violation demonstrates that it has acted, and will continue to act against KEMYA's interests.

Third, SABIC's alleged overcharging of the KEMYA partnership and efforts to prevent Exxon from litigating the overcharge claims represent another example that SABIC has compromised KEMYA's interests. Exxon argues that KEMYA's interests will not be adequately protected unless either ECAI or KEMYA is joined.

The Court agrees with SABIC that complete relief could be accorded to the parties without KEMYA's presence and that KEMYA lacks interests that would leave the parties subject to inconsistent obligations. But, this Court finds that KEMYA does have independent interests with regard to its licensing relationships, as Exxon describes, that would make it a necessary party under Rule 19(a), "if feasible."

B. Under Rule 19(b), All Indispensable Parties Must be Joined

SABIC does not agree that KEMYA and ECAI are necessary parties, so in its view, no further inquiry under Rule 19(b) is necessary. See Janney Montgomery Scott v. Shepard Niles Inc., 11 F.3d 399, 405 (3d Cir. 1993). ("A holding that joinder is compulsory under Rule 19(a) is a necessary predicate to a district court's discretionary determination under Rule 19(b) that the party is indispensable."). SABIC

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points out that even if ECAI is deemed "necessary," not all necessary parties are indispensable. RPR & Assoc., 921 F.Supp. at 1463. The practical effect here is that if the Court finds ECAI or KEMYA to be indispensable, their addition would destroy diversity jurisdiction and require the dismissal of this case.

When a necessary party who should be joined cannot be joined, the Court must analyze the factors in Rule 19(b) to determine whether to proceed without the absent party, or to dismiss the action.[10] If the merits can be determined without prejudice to the rights of the necessary but absent parties, a court of equity will strain hard to reach that result. See Bourdeau v. Pacific Western Oil. Co., 299 U.S. 65, 70, 57 S.Ct. 51, 81 L.Ed. 42, 53 (1936) *reh'g denied*, 299 U.S. 622, 57 S.Ct. 228, 81 L.Ed. 458 (1936). "In determining whether a party is indispensable, the court must consider the practical potential (for prejudice in the context of the particular factual setting . . ." RPR & Assoc., 921 F.Supp. at 1463, *citing* Provident Tradesmen Bank & Trust Co., 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936.

SABIC suggests that the Rule 19(b) factors establish that KEMYA is not "indispensable." First, a decision on SABIC's derivative claim will not prejudice KEMYA or expose Exxon to multiple claims. Second, even if there were some conceivable risk to Exxon, there are measures by which such perceived risk can be averted or lessened. Fed. R. Civ. P. 19. Advisory Comment at 121. As example, injunctive relief could fully protect Exxon against risk of a later suit by

[10] Courts are reluctant to grant motions to dismiss based on nonjoinder, and do so only when the material defect cannot be cured and serious prejudice or inefficiency will result. See RPR & Assoc., 921 F. Supp. at 1463, *citing* Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S.Ct 733, 742, 19 L.Ed.2d 936 (1968).

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SABIC. Third, a judgment rendered in KEMYA's absence would adequately resolve the dispute as to all parties, including KEMYA, on whose behalf the action was filed. Finally, neither SABIC nor KEMYA will have an adequate remedy if the action is dismissed for nonjoinder.

H.B. General Corp., cited above, is instructive. That case addressed whether one partner in a limited partnership would be prejudiced by the absence of the partnership entity, because it could file its own identical claims against the defendant, thereby exposing it to multiple suits or inconsistent obligations. The Court initially determined that the partnership was a necessary party because of independent interests that it held. However, the Court, relying on pragmatic considerations, concluded that because there were only three partners, and there were no partners absent which might have an interest in suing the defendant, a decision against the plaintiffs fully protected the defendant, and no joinder was necessary.

Here, SABIC is the only partner able to prosecute the partnership's claims against Exxon. If SABIC loses on the merits, injunctive relief fully protects Exxon against further claims by SABIC on behalf of KEMYA. As SABIC argues, SABIC's derivative claim will not be prejudicial to KEMYA's interests or expose Exxon to multiple suits. Also, neither SABIC nor KEMYA has an adequate remedy if this action is dismissed for nonjoinder because of KEMYA Board deadlock. In light of these practical considerations, this Court finds that KEMYA is not an indispensable party in the context of Rule 19(b).

C. Waiver of Any Contention that KEMYA is an Indispensable Party

SABIC argues that Exxon has waived any contention that KEMYA is an indispensable party. SABIC interprets Exxon's

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counsel's representation in open court. "[w]e don't take the position that KEMYA is an indispensable party," as waiving the Rule 19 claim (Comprehensive Lorell Decl. Ex. N). Exxon denies that this one statement constitutes waiver. It admits that counsel made the statement only because SABIC treated Exxon and ECAI as the same party. After SABIC reversed itself, and asserted that Exxon cannot represent ECAI's interests, it became clear that either ECAI or KEMYA must be joined.

Even though Exxon's counsel said what he said, the Federal Rules expressly declare that a party cannot waive the defense of failure to join an indispensable party.[11] "[A]n objection based on the absence of an indispensable party can be raised at any time, even by an appellate court . . ." Travelers Indem. Co. v. Household Int'l, Inc., 775 F.Supp. 518, 529 (D.Conn. 1991).

An Illinois case advanced by SABIC, National Acceptance Co. v. Wechsler, 489 F.Supp. 642, 645 (N.D. Ill. 1980), is not helpful because the court held that the party seeking joinder had *contractually* waived its right to join myriad other parties. Id. at 645. Exxon has never contractually agreed to waive its right to bring this motion. There has been no waiver of Exxon's joinder claim.

D. Joinder and Diversity Jurisdiction

The Court surmises that SABIC does not seek to join ECAI or KEMYA because such joinder would destroy diversity jurisdiction—KEMYA and Exxon are Texas residents.

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[11] See Fed. R. Civ. P. 12(h), Advisory Comm. Notes to 1966 Amendment ("It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver . . . the more substantial defenses of . . . failure to join an indispensable party under Rule 19 . . . are expressly preserved against waiver . . . .")

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SABIC responds that even though both KEMYA and Exxon are Texas residents, courts have a duty in diversity cases to realign the parties according to their interests. See Develop. Finance Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156, 159 (3d Cir. 1995) (Describing a "fundamental principle of federal jurisdiction that '[i]n determining the alignment of parties for jurisdictional purposes, the courts have a 'duty' to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'") *(quoting* Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 62 S.Ct. 15, 17, 86 L.Ed. 47 (1941)). Because KEMYA's interest is to seek enforcement of the Service Agreement —which SABIC contends on KEMYA's behalf that Exxon has breached—KEMYA should be aligned with SABIC as a plaintiff.[12]

Exxon concedes that adding either ECAI or KEMYA will destroy diversity because a partnership is deemed a citizen of each state where its partners are individual citizens. Carden v Arkoma Assocs., 494 U.S. 185, 195, 110 S.Ct. 1015, 108 L.Ed.2d. 157 (1990), HB General, 95 F.3d at 1190 ("for diversity jurisdiction purposes, a limited partnership is considered a citizen of each state in which its partners . . . are citizens"). KEMYA is a citizen of Saudi Arabia, where SABIC is incorporated, and of Texas, where ECAI has its principal place of business. Joinder of KEMYA would destroy diversity because both KEMYA and Exxon are citizens of Texas. See VMC/PCA LP v. PCA Partners LP, 727 F.Supp. 1167, 1169 (N.D. Ill. 1989).

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[12] See Duffey v. Wheeler, 820 F.2d 1161 (11th Cir. 1987) (In a derivative action brought by one of two shareholders in a close corporation, court allowed corporation to be aligned with plaintiff, reversing lower court decision that corporation be named a nominal defendant).

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When joinder of a partnership to a derivative suit is not feasible due to diversity requirements, the suit must be dismissed unless all partners are joined as parties to the suit. HB General, 95 F.3d at 1193. However, applying the Rule 19(b) factors here, the Court finds that neither KEMYA nor ECAI is an indispensable party because this Court in equity finds that any judgment rendered in the party's absence will be adequate and not prejudicial to such absent parties since each is represented by 50% partners SABIC and Exxon (as grandparent to ECAI) in this lawsuit. Furthermore, SABIC will not have an adequate remedy if this action is dismissed for non-joinder. Neither ECAI or KEMYA will be considered and added as indispensable parties. Diversity jurisdiction remains.

4. SABIC's Motion to Dismiss the NJ-II Complaint Under the Foreign Sovereign Immunities Act (FSIA)

In NJ-II, SABIC moves to dismiss the complaint claiming immunity as a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et. seq.*, lack of personal jurisdiction and improper venue. Alternatively, SABIC argues that the court should abstain from exercising jurisdiction even if jurisdiction exists. Further, SABIC asks the Court to dismiss ExxonMobil as a third-party plaintiff because it lacks standing to assert the third-party beneficiary claims. In the event that the complaint survives, SABIC contends that the jury demand should be stricken.

A. Standard of Review

Unlike a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), in a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R Civ. P. 12(b)(1), no presumption of truthfulness attaches to the allegations in the complaint and the court may consider matters outside the pleadings such as affidavits and other

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material properly before the court. Mortensen v. First Federal Savings & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In a Rule 12(b)(l) motion, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen, 549 F.2d at 891. "[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." Id. at 891. The plaintiff must not only demonstrate that a controversy existed at the time it filed suit but that it continues to exist throughout the litigation. Spectronics Corp. v. H.B. Fuller Co., 940 F.2d 631, 635 (Fed. Cir. 1991). A motion to dismiss for lack of subject matter jurisdiction predicated on the legal insufficiency of a claim may be granted if the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), *cert denied*, 501 U.S. 1222, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991)(quoting Bell v. Hood, 327 U.S. 678, 683, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

B. Subject Matter Jurisdiction

SABIC contends that this court lacks subject matter jurisdiction under both of the grounds that Exxon asserts. SABIC argues that this Court lacks diversity jurisdiction under 28 U.S.C. § 1332 and original jurisdiction under 28 U.S.C. § 1330, the Foreign Sovereign Immunities Act.

1. Diversity Jurisdiction

As SABIC argues, diversity jurisdiction does not exist in this case. Section 1332 confers diversity jurisdiction upon "a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." It is undisputed that SABIC, an entity of which approximately

70% is owned by the Kingdom of Saudi Arabia (Al-Ubaid Decl. ¶ 3), qualifies as a "foreign state" under the definition of 1603(a).[13] However, because SABIC is not the party plaintiff, Section 1332 would not confer jurisdiction. (Compl. ¶ 5). See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437 n. 5 (1989) (1916 amendments to §1332 eliminated diversity jurisdiction over "foreign state" defendants). As explained by the Supreme Court in Argentine Republic, "'[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.'" Id. (citing H.R.Rep., at 14, S.Rep., at 13, U.S. Code Cong. & Admin. News 1976, p. 6613).

2. Original Jurisdiction Under the FSIA

SABIC further argues that this Court lacks original jurisdiction over this matter because of immunities SABIC claims under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1602 et. seq. The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 610, 112 S.Ct. 2160, 2164, 119 L.Ed.2d 394 (1992). The FSIA grants district courts subject matter jurisdiction over actions against "foreign states" pursuant to 28 U.S.C. § 1330(a), which provides that "district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state" as to any claim for which "the foreign state is not

[13] See 28 U.S.C. § 1603(a) and (b) ("An 'agency or instrumentality of a foreign state means any entity . . . (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . .")

entitled to immunity under sections 1605-1607 of this title . . . ." The FSIA provides the "sole basis" for obtaining jurisdic-tion over a foreign sovereign in U.S. state and federal courts. Id.

Section 1604 of the FSIA provides that a foreign state shall be immune from the jurisdiction of U.S. federal and state courts, unless one of several statutory exceptions applies. 28 U.S.C. § 1604. When immunity under the FSIA is contested, the following burden-shifting analysis should be applied:

> [O]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with showing that, under exceptions to the FSIA, immunity should not be granted, Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F.Supp. 289, 293-4 (S.D.N.Y. 1987), although the ultimate burden of persuasion remains with the alleged foreign sovereign. Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n.6 (5th Cir. 1989).

Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317 (2d Cir. 1993) (quoting Cargill v. Int'l S.A. v. M/T Pavel Dybanko, 991 F.2d 1012, 1016 (2d Cir. 1993); see also Voest-Alpine Trading USA Corp. v. China New York Branch, 142 F.3d 887, 896 (5th Cir. 1998). As stated, it is undisputed that SABIC is a "foreign state" as defined by the FSIA. 28 U.S.C. § 1603(a). This Court will examine the applicability of exceptions to jurisdictional immunity under the FSIA.

3. Exceptions to Immunity

Section 1605 contains the disputed exceptions to sovereign immunity, commonly known as the "waiver" and the "commercial activities" exceptions:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver, (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .

28 U.S.C. §1605(a)(1)-(2).

a. Waiver Exception is Narrowly Construed.

As quoted, 28 U.S.C. § 1605(a)(1) provides that a foreign state shall not be immune from suit if the foreign state ". . . waived its immunity either **explicitly or by implication** . . . ." (emphasis added). Here there was no express waiver of immunity. See Agunda v. Texaco, 175 F.R.D. 50, 52 (S.D.N.Y. 1997), *vacated on other ground sub. nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (To establish express waiver, there must be a "clear, complete, unambiguous and unmistakable" manifestation of a sovereign's intent to waive its immunity.); see also Libra Bank Ltd. v. Bannco Nacional de Costa Rica, S.A., 676 F.2d

47, 49 (2d Cir. 1982). At issue here is whether there was an implied waiver of immunity.

Implied waiver has generally been limited to three categories: (1) when the foreign state has agreed to arbitration in another country; (2) when a foreign state has agreed that the law of a particular country shall govern a contract; or (3) when a foreign state has filed a responsive pleading in an action ***without raising the defense of sovereign immunity***. Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1291, n. 24 (11th Cir. 1999) (emphasis added). "The courts, loath to broaden the scope of the implied waiver provision, rarely have found that an action that does not fit one of the above three examples constitutes an implicit waiver." Id.

Exxon first argues that SABIC waived its immunity with its filing of the Delaware action that involved claims based on the same issues here, whether SABIC overcharged KEMYA and YANPET in breach of the Joint Venture Agreements. Relying on Matter of Rio Grande Transp. Inc., 516 F.Supp. 1155, 1159 (S.D.N.Y. 1981), SABIC argues that the mere filing of the Delaware action does not waive SABIC's immunity from suit elsewhere. According to SABIC, if Yanbu and ECAI wish to assert affirmative claims "arising out of the transaction or occurrence" as the subject matter of the Delaware action, they may only do so under 28 U.S.C. § 1607(b). 28 U.S.C. §1607(b) provides that foreign states cannot assert immunity with respect to any **counterclaim** "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." On that basis, SABIC asserts that Delaware is the only forum in the United States where Unipol royalty claims may be litigated. Exxon counters that SABIC has waived its immunity under Section 1605(a)(l) because nothing in the statute supports SABIC's

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view that it can waive sovereign immunity on a state-by-state basis.

This Court agrees with Exxon that SABIC cannot waive sovereign immunity on a state-by-state basis. SABIC points to no authority to support the assertion that only Delaware would have subject matter jurisdiction over this matter because of SABIC's waiver of immunity.

Moreover, in In re Oil Spill By Amoco Cadiz [Republic of France v. Standard Oil Co.], 491 F.Supp. 161 (N.D. Ill. 1979), the district court rejected a foreign state's argument that the mere filing of a complaint does not constitute waiver, and found that defendant had waived by implication its foreign state immunity to third-party claims under section 1605(a)(1). Id. at 167-168. There was an implied waiver because the foreign state had "[invoked] the jurisdiction of the United States to adjudicate claims which arose [outside the U.S.]" and because the claims at issue were based on the same transactions or occurrences as claims previously filed in U.S. courts by the foreign state. Id. And, as Exxon argues, the case offered by SABIC, In the Matter of Rio Grande Transp., Inc., 516 F.Supp. 1155 (S.D.N.Y. 1981), is not applicable because it involved a unique procedural rule that required the foreign state to file a conditional claim within six months of the plaintiff's claims. The foreign state defendant filed a conditional claim clearly asserting that the claim was to be considered only if its sovereign immunity defense was rejected. Here SABIC voluntarily began actions in two U.S. courts, and in the Delaware state action, seeks declaratory relief on the overcharge issue, the subject here.

Exxon also argues that SABIC waived its immunity by filing the NJ-I action. See 28 U.S.C. 1607(b); Matter of Rio Grande Transport, Inc., 516 F.Supp. 1155, 1159 (S.D.N.Y. 1981). According to SABIC, the filing of the NJ-I action alleging parent misappropriation does not serve to waive

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SABIC'S immunity from suit on subjects which do not arise out of the occurrence of that patent misappropriation. And SABIC argues that the only claims that Exxon (not Yanbu or ECAI) may file against SABIC in New Jersey are narrow counterclaims which are statutorily limited and circumscribed.[14]

This Court has already determined that the NJ-I, NJ-II and the Delaware action are based upon breaches of one overall agreement. Based on that determination, the filing of the NJ-I action waives SABIC's immunity from suit on the claims in NJ-II and the Delaware courts. In the NJ-I action, Exxon asserted various counterclaims. However, SABIC ***never raised*** sovereign immunity in response to such counterclaims, and expressly conceded jurisdiction under 28 U.S.C. § 1332 thereby evincing an intent to waive any sovereign immunity. This Court concludes that failure to raise sovereign immunity in the first responsive pleading constitutes an implied waiver. See Aquamar, 179 F.3d at 1291 ("Congress in enacting the FSIA, contemplated that a private attorney representing a foreign state could waive sovereign immunity implicitly by filing, on behalf of the state, a responsive pleading that did not raise the defense," *citing* H.R. Rep. No. 94-1487, at 18 (1976)).

Because SABIC has repeatedly invoked the protection of U.S. courts, including this Court, for claims against Exxon on

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[14] 28 U.S.C. §1607 provides: "In any action brought by a foreign state . . . in a court of the [U.S.] or of a state, the foreign state shall not be accorded immunity with respect to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 . . . had such claim been brought in a separate action against a foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

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the very same agreements among the very same parties, this Court determines that immunity under the FSIA has been waived by implication.

b. Commercial Activity" Exception

Exxon contends that the first and third clauses of Section 1605(a)(2) apply and defeat any jurisdictional immunity that SABIC has under the FSIA. Section 1605(a)(2) provides that a foreign state shall not be immune in any action based upon:

> a commercial activity carried on in the United States by a foreign state; or upon an act performed in the [U.S.] in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and . . . causes a direct effect in the [U.S.].

28 U.S.C. § 1605(a)(2).

As written, Section 1605(a)(2) provides that a foreign state shall not be immune from the jurisdiction of the United States in any case in which the action is based upon "a commercial activity carried on in the United States by the foreign state." Under Section 1603(e), the "commercial activity carried on in the United States by a foreign state" means "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act,' "the commercial character [of which] shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

This Court must determine whether SABIC's cause of action here was "based upon" commercial activity that had

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"substantial contact" with the United States. Exxon states that its breach of contract and fiduciary duty claims are based upon the following commercial activity in the U.S. by SABIC: (1) SABIC contracted with UCC, an American corporation, for exclusive rights to Unipol technology in Saudi Arabia; (2) the payments under this contract with UCC were made in New York for technology that SABIC had passed along to KEMYA and YANPET at a higher cost; (3) the failures to disclose had occurred during multiple KEMYA and YANPET Board Meetings that occurred in the U.S.; (4) payments from KEMYA and YANPET to SABIC for their rights to use Unipol technology were routed through banks in the United States en route to SABIC's accounts in Saudi Arabia.

SABIC counterargues that the commercial activity upon which Exxon relies is not a necessary element of their claim for breach of contract and fiduciary duty claims and does not meet the "based upon" requirement under the Act. (A1-Ubaid Decl. ¶¶ 6-7). The Supreme Court in Saudi Arabia v. Nelson, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), described "based upon" as "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357, 113 S.Ct. at 1477. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim." Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991). This Court agrees with SABIC that Exxon's claims are not based upon commercial activity alleged to have occurred in the U.S. Exxon is claiming that SABIC had breached the Joint Venture Agreements and its fiduciary duty in overcharging royalties under two license agreements at a cost in excess of what was agreed upon under the Joint Venture Agreements. These two license agreements and the Joint Venture Agreements were all executed under,

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and are governed by, Saudi Arabia law. According to SABIC and undisputed, "[t]he costs incurred by SABIC to acquire and license the technology to KEMYA and YANPET were incurred in Saudi Arabia, and the payments SABIC received from both partnerships came to its bank in Saudi Arabia." (SABIC Reply Br. at 17.)

SABIC's failure to disclose the overcharge practice to their ECAI and Mobil Yanbu counterparts at KEMYA and YANPET board meetings that occurred with the United States does not constitute an "act" that occurred within the United States. See Chemarketing Indust., Inc. v. C.V.G., No. 97 CIV. 1791, 1998 WL 199937 at *3 (S.D.N.Y. April 23, 1998)(failure to open a letter of credit cannot constitute an act that occurred in the United States). Further, the facts that UCC was an American corporation and that SABIC directed payments to UCC to New York are related to (as argued below, with respect to personal jurisdiction) but are not the activities upon which Exxon's legal claim is based. That YANPET and KEMYA's payments to SABIC were routed through the United States do not constitute substantial contact with the U.S. as required by the exception.

Exxon next argues that any immunity that SABIC has under the FSIA is defeated by the exception found in the third clause of Section 1605(a)(2): a foreign state shall not be immune in any case in which the action is based "upon an act outside the territory of the [U.S.] in connection with a commercial activity of the foreign state elsewhere and that act causes a ***direct effect*** in the [U.S.]" 28 U.S.C. § 1605(a)(emphasis added). This clause requires the following elements to be satisfied to avoid immunity under the FSIA: "(1) an act outside the [U.S.] (2) in connection with commercial activity outside the [U.S.] (3) that causes a direct effect in the [U.S.]." Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 894 (5th Cir. 1998).

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Exxon claims that the direct effect exception applies because SABIC entered into and breached Joint Venture Agreements with two American corporations. ECAI and Yanbu, causing Plaintiffs and Exxon, a third-party beneficiary, great financial loss. Exxon argues that if any money is owed, such is owed directly to ECAI and Yanbu. SABIC does not contest that the complaint is based upon SABIC's acts with regard to these alleged overcharge practices and that these acts were in connection with commercial activity outside the U.S.

However, in SABIC's view, mere economic loss to an American plaintiff arising from a breach of performance occuring outside the U.S. is not a "direct effect." See Dominican Energy Ltd., Inc. v. Dominican Republic, 903 F.Supp. 1507, 1515 (M.D. Fla. 1995). According to SABIC, the financial loss to ECAI and Yanbu was not direct because SABIC overcharged KEMYA and YANPET, not ECAI and Yanbu.

Exxon counters that the contractual obligations at issue are directly owed to ECAI and Yanbu and that the technicalities of corporate structure cannot be used to negate direct effect. Also, Exxon argues that SABIC's assertion that "mere economic loss" to an American plaintiff does not satisfy the "direct effect" requirement conflicts with many cases in which courts have found that economic injury to U.S. entities constituted a "direct effect" in the U.S. See, e.g., Voest-Alpine, 142 F.3d at 897 ("we hold that a financial loss incurred in the United States by an American plaintiff, if it is an ***immediate consequence*** of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception" (emphasis added)); Ampac, 797 F.Supp. at 977 (finding that based on allegation in complaint that American Defendants would suffer injury to business reputation and lose profits in

the U.S., that the "harm alleged follows as an 'immediate consequence' of Defendants' activities".)

The Second Circuit in Texas Trading has noted:

> Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss.

647 F.2d at 312; see also Tifa Ltd. v. Republic of Ghana, 692 F.Supp. 393, 403 (D.N.J. 1988) (finding direct effect due to plaintiff's financial loss from non-payment for goods, even though the money owed by the Ghanaian government was to be paid in Ghana through an intermediary Ghanaian corporation); Crimson Semiconductor, Inc. v. Electronum, 629 F.Supp. 903, 907 (S.D.N.Y. 1986) (finding exception applied 'because the breach had a 'direct effect' in the United States, namely, a financial loss suffered by the beneficiary of the contract, a New York corporation.").

Also, with regard to the "direct effect" exception, the leading case. Weltover, 504 U.S. 607, 112 S.Ct. 2160, "teaches that the effect in the United States need only be slight." Id. at 618; 112 S.Ct. at 2168; Ampac Group, Inc. v. Republic of Honduras, 797 F.Supp. 973, 977 (S.D. Fla. 1992). The effect need not be "substantial" and "foreseeable." Weltover, 504 U.S. at 618, 112 S.Ct at 2168. Rather, an effect "is 'direct' if it follows as an ***immediate consequence*** of the defendants' . . . activity.'" Id. (emphasis added); see also Ampac, 797 F.Supp. at 977.

The facts of Weltover illustrate how slight the effect could be to constitute "direct effect." The Weltover bond holders brought a breach of contract action against the Republic of Argentina and its central bank arising out of Argentina's

unilateral extension of the time for payment on the bonds issued as part of a currency stabilization plan. Id. at 609-10, 112 S.Ct. at 2163-2164. The District Court denied Argentina's motion to dismiss for lack of subject matter jurisdiction, and held that Argentina was not immune under the FSIA. The Court of Appeals affirmed. The Supreme Court defined "commercial activity" that is an exception to immunity under the FSIA: "[W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA." Id. at 614, 112 S.Ct. at 2166. Employing that definition, the Court found that Argentina was engaging in "commercial activity" when it unilaterally issued its bonds. Id. at 617, 112 S.Ct. at 2167. The Supreme Court also addressed whether Argentina's activities had a "direct effect" in the United States: Because the holders of the bonds could designate New York as one of several locations as the place of repayment, the rescheduling of those obligations necessarily had a "direct effect" in the United States." Id. at 619, 112 S.Ct. at 2168.

This Court finds that contrary to SABIC's assertion, there is no requirement of a "legally significant act in the U.S. beyond a financial loss" to satisfy the direct effect requirement. Voest-Alpine, 142 F.3d at 894 (refusing to ascribe a "legally significant act" requirement to the direct effect test); *see generally,* Weltover, 504 U.S. at 618; 112 S.Ct. at 2168. This Court concludes that ECAI, Yanbu, and Exxon's financial loss suffices for "direct effect" such that the commercial activity exception applies, abrogating SABIC's foreign sovereign immunity.

B. Personal Jurisdiction

SABIC further argues that Exxon's complaint should be dismissed because this Court lacks personal jurisdiction.

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1. Consent to Personal Jurisdiction

This Court finds that SABIC consented to personal jurisdiction in New Jersey when it filed the NJ-I action in 1998. As discussed, NJ-I is based on claims arising from the same overall transaction as the matter here. It follows then that SABIC's initiation of litigation in this forum state on claims arising out of the same transaction surrenders any objection to personal jurisdiction by SABIC. Gen'l Contracting & Trading Co. v. Interpole, Inc., 940 F.2d 20, 23 (1st Cir. 1991) (By availing itself of the benefits of the New Hampshire courts by instigating a lawsuit against the plaintiff, "it is inevitable that [the defendant] surrendered any jurisdictional objections to claims that [the plaintiff] wished to assert against it in consequence of the same transaction or arising out of the same nucleus of operative facts."); see generally, Adam v. Saenger, 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed. 649 (1938) (rejecting plaintiff's jurisdictional objections to counterclaims filed by defendant, the court held: "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.")

SABIC refers to Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 n.8 (8th Cir. 1977), Whistler Corp v. Solar Elecs., Inc., 684 F.Supp. 1126, 1131 (D. Mass. 1988), and Sullivan & Rilling, No. 94 c 539, 1996 WL 26840 *5 (N.D.Ill. Jan. 22, 1996) to support its proposition that, "as a matter of law, the filing and prosecution of a lawsuit does *not* constitute the requisite minimum contacts to establish personal jurisdiction." (SABIC's Mem. In Support of Mot. at 22.) However, unlike our situation here and there in General Contracting, the cases offered by SABIC do not deal with a former suit initiated by the defendant on claims arising out of

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a common transactional core. Because of this Court's conclusion that SABIC has consented to personal jurisdiction in this forum, a long arm analysis is unnecessary. That said, in further support of the existence of personal jurisdiction, this Court will conduct the analysis.

2. Minimum Contacts

a. Standard

Pursuant to Federal Rule of Civil Procedure 4(e), federal "district courts have personal jurisdiction over non-resident defendants to the extent authorized under the law of the forum state in which the district court sits." Sunbelt Corp. v. Noble, Denton & Assoc., Inc., 5 F.3d 28, 31 (3d Cir. 1993). New Jersey's long arm statute provides for personal jurisdiction as far as permitted by the Fourteenth Amendment to the United States Constitution. See N.J. Court Rule 4:4-4(c); Carteret Savings Bank, FA v. Shushan, 954 F.2d 141, 145 (3d Cir. 1992); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir. 1981). The question of whether this Court has jurisdiction over the defendant is determined by federal constitutional law. See Mesalic v. Fiberfloat Corp., 897 F.2d 696, 698 (3d Cir. 1990).

The Fourteenth Amendment permits a state to exercise jurisdiction over an out-of-state defendant only when "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). It is the plaintiff's burden to prove that the defendant has purposefully availed himself of the forum state. See Burke v. Quartey, 969 F.Supp. 921, 924 (D.N.J. 1971).

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To prove purposeful availment, a plaintiff may rely upon a defendant's specific contacts with the forum state. Personal jurisdiction pursuant to such contacts is known as specific jurisdiction. Specific jurisdiction is invoked when a claim is "relate[d] to" or "arises out of" the defendant's contacts with the forum. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984): Dollar Sav. Bank v. First Sec. Bank of Utah, 746 F.2d 208, 211 (3rd Cir. 1984).

A court must first determine whether the defendant had the minimum contacts with the forum necessary for the defendant to have "reasonably anticipate[d] being haled into court there." Wor1d-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980) (citations omitted). What constitutes minimum contacts varies with the "quality and nature of the defendant's activity." Hanson, 257 U.S. at 253, 758 S.Ct. at 1240, 2 L.Ed.2d 1283. In assessing the sufficiency of minimum contacts for personal jurisdiction, the court must focus on "'the relationship among the defendant, the forum and the litigation.'" Keeton v. Hustler, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (citations omitted). Otherwise stated, there must be at least "a single deliberate contact" with the forum state that relates to the cause of action. United States Golf Ass'n v. United States Amateur Golf Ass'n. 690 F.Supp. 317, 320 (D.N.J. 1988). The unilateral acts of the plaintiff, however, will not amount to minimum contacts. *Helicopteros*, 466 U.S. at 414, 10[illegible] S.Ct. at 1872; Hanson, 357 U.S. at 253, 78 S.Ct. at 1239-4[illegible].

Second, assuming minimum contacts have been established, a court may inquire whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King, 471 U.S. at 476, 105 S.Ct. at 2184 (quoting Int'l Shoe Comp. v. Washington, 326 U.S.

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310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945)); Pennzoil Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 201 (3d Cir. 1998).

Even if a non-resident has sufficient minimum contacts with the forum, the exercise of jurisdiction must still comport with "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316, 66 S.Ct at 158. To determine the fairness and reasonableness of the forum's exercise of jurisdiction, it is necessary to consider the "burden on the defendant, the interests of the forum state and the plaintiff's interest in obtaining relief." Asahi Metal Indus. Co., v. Superior Court of California, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). The Asahi Court cautioned that "[t]he unique burdens placed upon who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long-arm of personal jurisdiction over national borders." Id. at 114, 107 S.Ct. at 1033.

28 U.S.C. 1330(b) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction (when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies] where service has been made under section 1608 of this title." This Court has established through its discussion of the waiver and commercial activity exceptions under § 1605 that subject matter jurisdiction exists. As long as proper service has been made (an issue not in dispute) and the requirements of due process satisfied, this Court has personal jurisdiction. See Weltover v. Republic of Argentina, 753 F.Supp. 1201, 1207 (S.D.N.Y. 1991).

A foreign state is entitled to the same constitutional due process protections as natural persons. Walpex v. Yacimientos Petroliferos Fiscales Bolivianos, 712 F.Supp 383, 390 (S.D.N.Y. 1989) (citing Texas Trading, 647 F.2d at

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307); Unidyne Corporation v. Aerolineas Argentinas, 640 F.Supp. 354, 360 (E.D. Va. 1985). Instead of requiring "minimum contacts" with a state, the analysis of minimum contacts with a foreign sovereign is nationwide. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490, 103 S.Ct. 1962, 1969, 76 L.Ed.2d 81 (1983); Texas Trading, 647 F.2d at 314; Ruiz v. Transportes Aereos Militares Ecuadorianos, 103 F.R.D. 458, 459-460 (1984). Furthermore, statutory personal jurisdiction for a foreign state is not limited to specific jurisdiction but general jurisdiction as well. See Walpex, 712 F.Supp. at 390.

b. Analysis

A court has specific jurisdiction over a defendant when that defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that '***arise out of or relate to***' those activities." Burger King Corp, 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d 528. The Court finds that SABIC is subject to specific jurisdiction based on its contacts in this country that are related to the activities upon which this litigation is based. SABIC sent representatives to the U.S. Board meetings of KEMYA and YANPET where the alleged failure to disclose the over-charges occurred. (Sher Aff. ¶13). By SABIC's instructions, some of the payments from KEMYA and YANPET to SABIC under the SABIC-KEMYA sublicense passed through United States banks. Also, SABIC's payments to UCC, an American Corporation, under the Unipol Agreement took place in New York (Sher Aff., ¶¶ 5-6). As Exxon argues, evidence of payments by SABIC to UCC is related to the claims here because the alleged overcharges result from the differential between KEMYA and YANPET's payments to SABIC and SABIC's payments to the UCC. Further, Exxon alleges in the First Amended Complaint that some of the discussions between SABIC, Exxon, Mobil, ECAI and/or

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Mobil Yanbu before the Joint Venture Agreements took place in the U.S.

For personal jurisdiction to comport with "fair play and substantial justice," it must be reasonable to require the defendant to defend the suit in the forum state. See World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. at 292, 100 S.Ct at 564. To determine reasonableness, a court considers the following factors: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering substantive social policies. Id. Only in "rare cases [do the] 'minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." Asahi Metal Indust. Co., Ltd. v Superior Court of Cal., Solano County, 480 U.S. at 116, 107 S.Ct. at 1034 (quoting Burger King, 471 U.S. at 477-478, 105 S.Ct. at 2184-2185.).

Not only did SABIC engage in deliberate activities in the United States related to the claims here, but SABIC also purposefully availed itself of the protection of the U.S. laws by filing the NJ-I and Delaware actions. Consequently, SABIC could reasonably anticipate being hauled into Court, especially since it was SABIC who originally hauled Exxon into this district court. Based upon the fact that SABIC is litigating two other lawsuits in the United States, one of which is in this forum, this Court concludes that it is not overly burdensome for SABIC to litigate this matter here. Because NJ-I and NJ-II involve claims related to an overall agreement, this Court has determined that the most efficient and convenient resolution of this matter would be to keep NJ-II in this forum and consolidate it with the NJ-I action (as

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further explained in this opinion). For these reasons, this Court finds that the personal jurisdiction of the matter comports with "fair play and substantial justice."

From allegations in the First Amended Complaint ("FAC"), this Court opines that further jurisdictional discovery may uncover evidence of SABIC's "continuous and systematic" contacts with the U.S. to support general jurisdiction. (FAC ¶ 13.) However, this Court finds that further discovery on this ground is unnecessary because of this Court's determination that personal jurisdiction exists through SABIC's consent to personal jurisdiction and because of this Court's specific jurisdiction over this matter.

C. Venue

SABIC also urges that Plaintiffs' complaint be dismissed for improper venue. 28 U.S.C. § 1391(f), which governs venue in actions against foreign states, provides:

> A civil action against a foreign state as defined in § 1603(a) of this title may be brought—
>
> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under § 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in § 1603(b); or

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> (4) in the [U.S.] District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

SABIC argues that venue is improper in New Jersey because no events relating to plaintiffs' claims occurred here; there is no vessel or cargo here, and SABIC is neither licensed to conduct, nor does it conduct any business in New Jersey. SABIC argues that the only proper venue is the District of Columbia under §1391(f)(4) because a transfer to cure improper venue may be made only "to any district or division in which [the case] could have been brought." 28 U.S.C. §1406(a).

Exxon retorts that venue is proper because SABIC is doing business in New Jersey. As quoted above, subsection (3) of 28 U.S.C. §1391(f) states that venue is proper if the foreign state is "in any judicial district in which the agency or instrumentality is ***licensed to do business or is doing business*** . . . ." (emphasis added.) SABIC's 1999 Annual Report demonstrates that it has a facility in Wayne, New Jersey, through which it presumably distributes goods. (FAC, ¶¶ 13, 15; see Sher. Aff., ¶7, Ex. A). According to the FAC, SABIC has regularly sent its employees to technology exchange meetings at UCC's Bound Brook, New Jersey facility and has frequently communicated with UCC personnel there. (FAC, ¶ 15) SABIC has also contracted with New Jersey corporations, including Exxon for various projects (Id, ¶¶ 1, 13).

Exxon also argues that SABIC waived its right to object to venue when it filed the NJ-I action in this Court in 1998. Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1349 (11th Cir. 1982); see also H.R. Rep. No. 94-1487, at 32 (1976) reprinted in 1976 U.S.C.C.A.N. 6604, 6631.

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SABIC reminds us that "doing business" has been defined in this district as "engaging in transactions there to such an extent and of such a nature that the state in which the district is located could require the corporation to qualify to 'do business' there". Vivadent (USA), Inc. v. Darby Dental Supply Co, Inc., 655 F.Supp. 1359, 1362 (D.N.J. 1987) (quoting Johnson Creative Arts v. Wool Masters, 743 F.2d 947, 954 (1st Cir. 1984)). SABIC argues that its activities in New Jersey are not of the extent to which New Jersey would require it to qualify to "do business" here.

First, it should be noted that the Vivadent and Johnson consider "doing business" as applied in section 1391(c), which relates to foreign corporations rather than a foreign state as defined under the FSIA. Second, it should be recognized that a new section 1391(c) was adopted in 1988 which changed the requirement to 'any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C.A. §1391(c), as amended by Act of Nov. 19, 1988, Pub.L. 100-702, §1013, 102 Stat.4624, 4669. And, this Court does not agree with the test proposed by SABIC of "doing business" for reasons well-articulated by Wright, Miller and Cooper:

> The licensing standard that the First Circuit chose . . . has literally nothing to do with place of suit or protection against an inconvenient forum. The rules on when a state may require a foreign corporation to qualify if it wishes to do business there are derived from the Commerce Clause. One of the consequences of the licensing standard the First Circuit has adopted is that a corporation will never be found to be 'doing business' for purposes of § 1391(c) it is doing a wholly interstate business within the state. This will prevent § 1391(c) from being used in many cases involving extensive activity by a corporation within the district.

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15 Federal Practice and Procedure, § 3811 at 121 (footnotes omitted).

This Court finds that the business activity described by Exxon is sufficient to meet the "doing business" requirement under § 1391(f). Additionally, because SABIC chose to litigate NJ-I here, the "underlying venue principles of fairness and convenience" are served by retaining venue in the matter. Eason v. Linden Avionics, Inc., 706 F.Supp. 311, 327 (D.N.J. 1989).

Venue is proper in this district; this Court has jurisdiction over SABIC. SABIC's motions to dismiss based on a lack of subject matter jurisdiction, personal jurisdiction and improper venue are denied).[15] Exxon's separate motion for discovery to establish the jurisdictional issues has been rendered moot.

D. Abstention

SABIC next argues that under the abstention doctrine to avoid concurrent litigation, this Court should abstain from hearing the NJ-II action because it is allegedly duplicative and wastes judicial resources.

Some background is necessary: SABIC filed the NJ-I action alleging patent misappropriation in this Court in 1998. In July 2000, it filed a lawsuit in Delaware state court involving the same parties, but seeking declaratory relief that the royalty charges to Yanbu and ECAI were proper under the Joint Venture Agreements. Exxon filed the NJ-II action in August 2000, only a few weeks after the Delaware Action, claiming that the royalty charges violated the Joint Venture Agreements by allegedly overcharging Yanbu and ECAI millions of dollars. SABIC's premise for its abstention argument is that these are all different, unrelated lawsuits, and that

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abstention is desirable to allow the Delaware Action to proceed. However, this Court has already found that the claims and defenses in the NJ-I, II and Delaware actions are all part of the same overall agreement, such that they should be heard together.

Nevertheless, SABIC wants this Court to abstain in favor of allowing the Delaware action to proceed for reasons of alleged "sound judicial administration." For the reasons that follow, this Court will not abstain.

1. *Colorado River* Abstention

In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court held that abstention is justified only when "exceptional" circumstances support a federal district court's decision to abstain out of deference to parallel state-court litigation. Colorado River, 424 U.S. at 818, 96 S.Ct. at 1246. Colorado River and its progeny emphasize that the mere duplicativeness of parallel state and federal litigation is insufficient to justify abstention on the part of a federal district court '"[Generally] . . . the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction."' Id. at 817 (quoting McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762, 767 (1910)). Rather, "the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25-26, 103 S.Ct. 927, 942, 74 L.Ed.2d 765 (1983).

Colorado River identified four factors a federal court should consider when determining whether to abstain from jurisdiction: (1) whether one court first obtained *in rem* (or *quasi in rem)* jurisdiction over property involved in that

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litigation; (2) "inconvenience of the federal forum"; (3) "desirability of avoiding piecemeal litigation"; and (4) "the order in which jurisdiction is obtained by the concurrent forums." Colorado River, 424 U.S. at 818-819, 96 S.Ct. at 1247. Moses Cone added two additional factors to consider: (1) whether federal or state law applies; and (2) adequacy of state court proceeding. Moses Cone, 460 U.S. at 23-27; 103 S.Ct. at 941-942. In considering these factors: "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly case from case, depending on the particular setting of the case." Id. at 16.

There is no dispute that this matter parallels the action filed in Delaware. Generally, pending actions in state and federal court are "parallel" when the cases involve "the same parties and claims." Ryan v. Johnson, 115 F.3d 193, 196 (3d Cir. 1997). Here the NJ-II and Delaware actions involve the same parties (Yanbu and ECAI), and involve identical claims—adjudication of whether SABIC has overcharged Yanbu and ECAI in their royalty payments, in violation of Art. 6.3 of the respective Joint Venture Agreements and whether SABIC has properly charged KEMYA and YANPET under each of their Unipol sublicenses for the use of Unipol® process. Although NJ-II and the Delaware action are parallel, the Colorado River factors discussed below require this Court not to abstain.

a. Jurisdiction over Property

Neither of the actions involves *in rem* or *quasi in rem* jurisdiction over property; this factor is inapplicable. Allied

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Nut and Bolt, Inc., v. NSS Indus., 920 F.Supp. 626, 631 (E.D. Pa. 1996).

b. Inconvenience of the Forum

SABIC points out that Yanbu is a Delaware corporation and maintains its principal place of business in Wilmington, Delaware. Also, ECAI is a Delaware corporation, with its principal place of business in Texas. According to SABIC, neither Yanbu or ECAI is inconvenienced by the need to litigate in Delaware. Indeed, Delaware was the *only* forum where SABIC could sue both of these parties, because neither was amenable to suit in New Jersey.

Also, Yanbu and ECAI must respond by filing a compulsory counterclaim in Delaware. See Del. Sup. Ct. R. Civ. P. 13 ("[a] pleading shall state as a compulsory counterclaim any claim which at the time of . . . the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."). Thus, the case is properly in Delaware, says SABIC.

Exxon counters that the New Jersey forum is more convenient than any other forum, including Delaware, because SABIC initiated the NJ-I action here first. Also, SABIC has no connection to Delaware. Exxon is incorporated in New Jersey, and no relevant events took place in Delaware. Further, no witnesses or evidence are found in Delaware. This Court finds that the New Jersey forum is not inconvenient for the parties involved and that this factor weighs in favor of this Court not abstaining.

c. Desirability of Avoiding Piecemeal Litigation

SABIC claims that the desire to avoid piecemeal litigation here warrants abstention. According to SABIC, if both the New Jersey and Delaware actions proceed to litigate the same

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issues between the same parties, there will be needless and wasteful duplication of efforts, and possibly inconsistent rulings: abstention by staying or dismissing the second filed "reactive" suit is appropriate.

"[I]t is evident that the 'avoidance of piecemeal litigation' factor is met . . . only when there is evidence of a strong federal policy that all claims should be tried in state courts." Ryan, 115 F.3d at 197-8; see also, Colorado River, 424 U.S. at 819-20, 96 S.Ct. At 1247-1248. (factor was met with evidence of clear federal policy that recognizes the availability of comprehensive state systems for adjudication of water rights); Moses Cone, 460 U.S. at 19-20; 103 S.Ct. at 939 (factor not met because Federal Arbitration Act did not have clear policy against piecemeal litigation).

This Court finds no clear federal policy here that would give rise to abstention. "The presence of garden-variety state law issues has not, in this circuit, been considered sufficient evidence of congressional policy to consolidate multiple lawsuits for unified resolution in the state courts." Ryan, 115 F.3d at 198. Moreover, because there is another closely-related matter being litigated in this forum (NJ-I), this Court finds that greater judicial economy is served by adjudicating these cases in this forum rather than in Delaware. This Court finds that this factor does not weigh in favor of abstention.

SABIC further argues that circumstances show there is an overriding federal policy to limit piecemeal litigation against foreign states under the FSIA. As discussed, this Court has found that SABIC is not entitled to sovereign immunity under the FSIA. Moreover, even if the FSIA was enacted to protect foreign states like SABIC, there is no indication that the statute demonstrates a preference for state adjudication of claims against foreign states. There are no "exceptional circumstances" favoring abstention with regard to this factor.

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d. Order in Which State and Federal Courts Obtained Jurisdiction

This Court first obtained jurisdiction through SABIC's filing of the NJ-I action in 1998. The Delaware action was filed on July 24, 2000. Pre-trial discovery has begun. The NJ-II action was filed in this Court by Exxon on August 3, 2000.[16] Discovery has not yet taken place. SABIC argues that the filing of the Delaware action before the filing of the matter here gives this Court reason to abstain. SABIC's argument is rejected because the NJ-I action was filed before the Delaware action. This Court finds that this factor weighs against abstention.

e. Source of Law that Governs

The law of Saudi Arabia applies to all of the agreements. (See Compl., ¶ 22). This factor is neutral as to whether the matter should be litigated in New Jersey or in Delaware. See Allied Nut & Bolt, 920 F.Supp. at 632.

f. Adequacy of State Court Proceedings

All of the claims, except Exxon's third-party beneficiary claim are in the Delaware action. Delaware Rule of Civil Procedure 13 requires ECAI and Yanbu to plead all compulsory counterclaims in the Delaware action. SABIC says that the Delaware action is adequate to protect the rights of all parties and to provide complete relief. See Allied Nut and Bolt, 920 F.Supp. at 632. This Court agrees that the state proceedings are adequate.

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[16] SABIC neglects to mention that the overcharge issue was already being litigated in the NJ-I action when SABIC filed the Delaware action. In fact, SABIC had already agreed to a consent order that would have required it to respond to overcharge discovery. Instead of responding, SABIC filed the Delaware Action. (Exxon Br. 25, n. 25).

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2. Conclusion

However, when weighing all of the Colorado River factors, this Court will *not* abstain because it does not find "exceptional circumstances" that would "justify the surrender" of federal jurisdiction. Moses Cone, 460 U.S. at 25-26; 103 S.Ct. at 942. Rather, SABIC essentially argues for this Court's abstention in this case because there are parallel state proceedings. As described, the mere existence of parallel state proceedings does not justify abstention under Colorado River.

E. Third-party Beneficiary Claims

Exxon asserts third-party beneficiary claims on behalf of ECAI, for breach of the Joint Venture Agreement from the alleged royalty overcharges. Exxon claims to be an "intended third-party beneficiary" of these Joint Venture Agreements. (See Compl., ¶ 28). SABIC argues that a parent corporation cannot, as a matter of law, assert third-party beneficiary status arising solely out of a contract between its subsidiary and another person.

A third-party cannot sue under a contract to which it is not a party unless it establishes that the contract was directly "'made (for the benefit of [that] party within the intent and contemplation of the contracting parties.'" Grant v. Coca-Cola Bottling Co., 780 F.Supp. 246 248-49 (D.N.J. 1991) (quoting First Nat'l State Bank of New Jersey v. Commonwealth Fed'l Sav. and Loan Assoc., 610 F.2d 164, 170 (3d Cir. 1980). Without such contractual intent and direct benefit, the third-party is merely an incidental beneficiary lacking standing to sue. Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982). Also, a parent corporation is prohibited from claiming third-party beneficiary status under a contract entered into by its subsidiary. Indeed, such claims are routinely dismissed because the purported "benefit" the parent corporation derives is incidental. See Dow Corning Corp.

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v. Chem. Design, Inc., 3 F.Supp.2d 361, 365-66 (W.D.N.Y. 1998).

SABIC urges that Exxon's claim of third-party beneficiary status be dismissed. Any alleged overcharge of royalties under the Unipol sublicenses would go to the KEMYA and YANPET, not Exxon.

Exxon responds that contrary to SABIC's assertion, it has never alleged that its status as a third-party beneficiary depends, in whole or in part, on its status as the ultimate parent company of either ECAI or Yanbu. Exxon has ***alleged*** that it is a third-party beneficiary of the Joint Venture Agreements; that is sufficient at this stage in the litigation. See Fed. R. Civ. P. 12(b)(6), 8(a). There is no heightened pleading standard for third-party beneficiary claims. Exxon says that the allegation in ¶ 28 of the first amended complaint suffices. This Court agrees.

In addition, Exxon (through its predecessors Exxon and Mobil) was deeply involved in the KEMYA and YANPET ventures since before their inception. While ECAI and Yanbu actually signed the Joint Venture Agreements, Exxon and Mobil representatives were involved in the pre-formation negotiations. Exxon and Mobil signed various agreements annexed to the Joint Venture Agreements, including the Exxon-KEMYA Service Agreement. The Court finds that Exxon may maintain its third-party beneficiary claims.

F. Jury Demand is Stricken

Finally, SABIC argues that if any portion of plaintiffs' complaint survives, the jury demand is barred by 28 U.S.C. §1330, and should be stricken. If jurisdiction is found under Section 1330, the Court's jurisdiction is limited solely to nonjury civil actions. 28 U.S.C. §1330(a). As noted earlier, SABIC is a foreign state, defined by 28 U.S.C. §1603(a) and as plead by plaintiffs. (Compl., ¶ 5).

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Whenever a plaintiff asserts jurisdiction under Section 1330 and simultaneously makes a demand for jury trial, courts *uniformly* grant motions to strike jury demands. Universal Consol. Cos., Inc. v. Bank of China, 35 F.3d 243, 245 (6th Cir. 1994). The jury demand is stricken because of Section 1330 jurisdiction.

5. MOTION TO CONSOLIDATE NJ-I AND NJ-II

Exxon moves to consolidate the NJ-I and NJ-II actions. This Court has already determined that alleged breaches by SABIC and Exxon were based on an "overall agreement" that links all three actions (NJ-I, NJ-II, Delaware Action).

> Fed. R. Civ. P. 42 provides:
>
> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Courts in this district have held that Rule 42 does not "demand that actions be identical before they may be consolidated." In re Cendant Corp. Litig., 182 F.R.D. 476, 478 (D.N.J. 1998). Rule 42 only requires a "common question of law or fact." Id.; see also 8 Moore's Federal Practice, § 42.10 at 42-8 (Matthew Bender, 3d. ed. 1997) ("[t]he articulated standard for consolidating two or more cases is simply that they involve a 'common question of law or fact.'") "Common questions of law and fact do not have to predominate." Id. at §42.10.

The Court enjoys broad discretion in determining whether to consolidate under Rule 42. See, e.g., Blake v. Farrell Lines, Inc., 417 F.2d 264, 266 (3d Cir. 1969) (affirming consolidation even where overlapping facts resulted in jury trial as to

issues of equity). In exercising this discretion, a court should weigh "the interests of judicial economy against the potential for new delays, expense, confusion or prejudice." Easton & Co. v. Mutual Benefit Life Ins. Co., 1992 WL 448794, at *4 (D.N.J. Nov. 4, 1992).

This Court exercises its discretion and consolidates the NJ-I and II actions. This Court has already held that the NJ-I and II actions arise from the overall Joint Venture Agreement that included the Service Agreement and the Unipol Agreement, the subject of the NJ-I and NJ-II actions respectively. Common questions of law and fact predominate. The interests of judicial economy and avoidance of potential confusion and prejudice favor consolidation.

CONCLUSION

With respect to the NJ-I motions, the motion for clarification or reformation of the March 10 Stipulation and the motion for partial judgment on the pleadings to strike Exxon's unclean hands and setoff defenses are denied. Exxon's cross-motion to dismiss pursuant to Rule 19 is denied; SABIC is not required to join either ECAI or KEMYA because they are not indispensable parties.

With respect to the NJ-II motions, SABIC is not entitled to immunity under FSIA because of its implied waiver to immunity. In addition, the "commercial activity" exception to immunity applies because SABIC's activities had a "direct effect" in the United States pursuant to 28 U.S.C. 1605(a)(2). This Court has determined that personal jurisdiction exists because of SABIC's consent to personal jurisdiction and its minimum contacts with this jurisdiction. There is sufficient evidence that SABIC was "doing business" in New Jersey and therefore, venue is proper in this District.

Abstention is denied under Colorado River because the balance of factors does not meet the exceptional circumstances standard to defeat federal jurisdiction. SABIC's motion to dismiss Exxon's claim of third-party beneficiary status is denied. The jury demand is stricken because SABIC is a foreign sovereign. Finally, the NJ-I and II actions are consolidated.

2 April 2002
Date
/s/ William H. Walls
William H. Walls, U.S.D.J.

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Civil Action No. 98-4897 (WHW)

SAUDI BASIC INDUSTRIES CORPORATION, INDIVIDUALLY AND IN THE NAME OF, AND ON BEHALF OF, AL-JUBAIL PETROCHEMICAL COMPANY, A PARTNERSHIP,
Plaintiff,

v.

EXXONMOBIL CORPORATION,
Defendant.

Civil Action No. 00-3841 (WHW)

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., and MOBIL YANBU PETROCHEMICAL COMPANY, INC.
Plaintiffs,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

ORDER

Walls, District Judge

This dispute concerns the alleged misuse of a patent and alleged overcharges of royalties to a partnership. In Civil Action No. 98-4897(WHW) ("NJ-I"), Plaintiff Saudi Basic Industries ("SABIC") moves to clarify or reform a March 10, 2000 Stipulation and moves pursuant to Rule 12(c) for partial judgment on the pleadings to strike Defendant ExxonMobil's

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("Exxon") defenses of unclean hands and set-off. Exxon cross-moves to dismiss the complaint pursuant to Rule 19 for SABIC's failure to join necessary and indispensable parties.

In Civil Action No. 00-3841 (WHW) ("NJ-II"), Defendant SABIC moves to dismiss the complaint based on immunity under the Foreign Sovereign Immunities Act, as well as on other jurisdictional grounds. Also, Defendant SABIC moves to dismiss ExxonMobil as a party plaintiff because of lack of standing to assert third-party beneficiary claims and moves to strike the jury demand because of this Court's jurisdiction under 23 U.S.C. §1330. Plaintiffs Exxon, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. move to consolidate the NJ-I and NJ-II actions into a single lawsuit.

For the reasons given in the accompanying Opinion, and for good cause shown,

It is on this 2nd day of April, 2002:

ORDERED that the motion for clarification or reformation of the March 10 Stipulation is denied;

IT IS FURTHER ORDERED that the motion for partial judgment on the pleadings pursuant to Rule 12(c) is also denied;

IT IS FURTHER ORDERED that Exxon's cross-motion to dismiss pursuant to Rule 19 is denied;

IT IS FURTHER ORDERED that SABIC's motion to dismiss for lack of jurisdiction and venue is denied;

IT IS FURTHER ORDERED that SABIC's motion to dismiss Exxon's claim of third-party beneficiary status is denied;

IT IS FURTHER ORDERED that the jury demand be stricken;

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IT IS FURTHER ORDERED that Exxon's motion to consolidate is granted.

/s/ William H. Walls
William H. Walls, U.S.D.J.

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APPENDIX D

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

C.A. No. 00C-07-161-JRJ

SAUDI BASIC INDUSTRIES CORPORATION,
Plaintiff,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC.
and EXXON CHEMICAL ARABIA, INC.,
Defendants.

Submitted: December 19, 2002
Decided: January 24, 2003

OPINION

*Upon Defendants' Motion to Realign the Order of Proof for Trial Presentation—**GRANTED.***

Donald E. Reid, Esquire, Morris, Nichols, Arsht & Tunnell, 1201 North Market Street, P.O. Box 1347, Wilmington, Delaware 19899, Kenneth R. Adamo, Esquire, Michael W. Vary, Esquire and Leozino Agozzino, Esquire, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 22114, Jeffrey W. Lorell, Esquire and Marc C. Singer, Esquire, Saiber, Schlesinger, Satz & Goldstein, LLC, One Gateway Center, 13th Floor, Newark, New Jersey 07102 and Cheryl L. Farine, Esquire, Hudak, Shunk & Farine Co., L.P.A., 2020 Front Street, Suite 307, Cuyahoga Falls, Ohio, 44221, for Plaintiff. William J. Wade, Esquire, Richards, Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899, James W. Quinn, Esquire and David Lender, Esquire, Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153, K.C. Johnson, Esquire, Exxon Mobil Corporation, 800 Bell Street, Suite 1686J, Houston, Texas 77002, for Defendants.

JURDEN, J.

INTRODUCTION/BACKGROUND

The issue before this Court in the instant motion is whether or not, in view of the facts of this case and the recognized rules of law and practice, realignment of the order of proof is appropriate.

In simple terms, the main issue in this case is whether SABIC breached certain agreements with Mobil Yanbu Petrochemical Company, Inc. and Exxon Chemical Arabia, Inc. (collectively, "ExxonMobil") by overcharging YANPET and KEMYA (The "Joint Ventures") for their use of Unipol® technology.[1] The Court will not recite the facts underlying this dispute; they are amply set forth in the voluminous pleadings, and memoranda filed in support of this motion and the outstanding summary judgment motions.

However, the procedural history leading up to this motion is critical to its determination. On July 24, 2000, the plaintiff, Saudi Basic Industries Corp. ("SABIC") filed a declaratory

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[1] *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 385 (D.N.J. 2002). As Judge Walls noted: "SABIC's complaint seeks declaratory relief . . . solely on the issue of whether the royalty charges were proper under the joint venture agreements." *Id.*

judgment action against ExxonMobil in this Court. This filing occurred one business day after the conclusion of media tion in a related case, pending in the United States District Court for the District of New Jersey. ExxonMobil alleges that SABIC wrongfully used information gleaned during that mediation, or settlement discussions, in violation of the parties express agreements, to file this suit "in a blatant attempt to gain a tactical advantage."[2] In short, ExxonMobil accuses SABIC of forum shopping in an effort to "avoid having the trier of fact in New Jersey hear about . . . [SABIC's] improper overcharges . . . ."[3]

In response to SABIC's declaratory judgment action, ExxonMobil filed counterclaims based on the alleged overcharges by SABIC including, *inter alia*, claims for breach of contract, breach of fiduciary duty, unjust enrichment and promissory estoppel. In the motion presently before this Court, ExxonMobil asks the Court to "realign" the order of proof for trial presentation because ExxonMobil "bears the burden of proof on the ultimate issue for trial, and because realignment in this instance promotes the conservation of judicial resources and lessens jury confusion."[4]

DISCUSSION

The parties agree that the trial judge has discretion in determining whether or not to depart from the usual order of

[2] Def.'s Mem. Law Supp. Mot. Realign Order Proof Trial Presentation at 3 [hereinafter Def.'s Mem. Law].

[3] *Id.* at 3, n.4.

[4] Def.'s Mem. Law at 5.

proof at trial.[5] That discretion is broad.[6] According to Delaware Uniform Rule of Evidence 611(a),

> *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, and (2) avoid needless consumption of time.[7]

ExxonMobil's concerns about conserving judicial resources and lessening jury confusion are well grounded. Having presided over this complicated dispute for over 15 months, and having become very familiar with the salient facts and issues through numerous, hotly contested discovery disputes and extensive motion practice, the Court firmly believes that realignment of the order of proof in this case would (a) result in a far more effective presentation "for the ascertainment of the truth," (b) "avoid needless consumption of time,"[8] and (c) reduce the potential for juror confusion. ExxonMobil argues that, "although SABIC is technically the plaintiff by virtue of winning its race to the courthouse, SABIC's Amended Complaint is merely a compilation of defenses."[9] ExxonMobil correctly points out that:

[5] Hr'g. Tr. (Dec. 19, 2002) at 115, 119.

[6] *See Tice v. State*, 624 A.2d 399,403 (Del. 1993); *Brothers v. McKay*, 544 A.2d 265, 265 (Del. 1988); *Gaston v. State* 234 A.2d 324, 325 (Del. 1967); *Baltimore & O. R.. Co. v. Hawke*, 143 A. 27, 31 (Del. 1928).

[7] DEL. UNIF. R. EVID. 611(a).

[8] *See* DEL. UNIF. R. EVID. 611(a).

[9] Def.'s Mem. Law at 7.

> [r]egardless of what the caption reads, SABIC is in the position of traditional defendant, asserting that it acted correctly. ExxonMobil, on the other hand, is in the position of traditional plaintiff, asserting the affirmative position that SABIC caused it harm by improperly overcharging the joint ventures, and that SABIC is liable for damages for its misconduct.[10]

In reality, SABIC is a "nominal" plaintiff; there is no question that the ultimate issue to be decided by the jury is whether SABIC overcharged the joint ventures. There is also no question that ExxonMobil bears the burden of proof with respect to this ultimate issue.

ExxonMobil further argues that "given the facts surrounding SABIC's filing, allowing it to have the benefits of being the plaintiff without the attendant burdens is grossly unfair."[11] Clearly, SABIC did win the race to the Courthouse,[12] and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC's actions, that it did not want the New Jersey District Court to decide the overcharge issue.[13] Given what transpired prior to the filing of this suit, the Court can only conclude that SABIC engaged in preemptive forum shopping when it

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[10] *Id.*

[11] Def.'s Mem. Law at 10.

[12] SABIC filed suit here just ten (10) days before ExxonMobil filed suit in New Jersey District Court on the same overcharge issue.

[13] SABIC argued to the New Jersey District Court that it should abstain from deciding the overcharge claims because SABIC filed this action before ExxonMobil filed the overcharge claims there.

decided to file a declaratory judgment action in the Delaware Superior Court rather than litigate this issue as a defendant in the New Jersey District Court. That being the case, the Court notes that:

> . . . the use of the device of declaratory judgment to anticipate and soften the impact of an imminent suit elsewhere concerning long past dealings between the parties for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a plaintiff's choice of forum.[14]

While the Court is historically reluctant to deprive a plaintiff of its choice of forum, it is not reluctant to accord less deference to that choice when there is "jockeying for position" by "resort to declaratory judgment for the purpose of defensively establishing priority as to forum."[15] Similarly, the Court is not reluctant to realign the order of proof where a party resorts to a preemptive strike via declaratory judgment for the purpose of securing priority as to forum, when realignment makes clear the true posture of the case.[16]

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[14] *Air Products and Chemicals, Inc. v. The Lummus Co.*, 252 A.2d 545, 547 (Del. Ch. 1968) *rev'd on other grounds*, 252 A.2d 543 (Del. 1969).

[15] *Id.*

[16] *See BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995) (realigning the parties to reflect actual controversy where plaintiff (BASF) filed declaratory judgment on statute of limitations, but defendant "claims injury by BASF, and is therefore the natural plaintiff"); *St. Paul Mercury Ins. Co. v. Lexington, Ins. Co.*, 888 F. Supp. 1372, 1376 (S.D. Tex. 1995) (realigning parties "to better represent the real claims and interests in the case."). *See also Schwendiman Partners, LLC v. Hurt*, 71 F. Supp. 2d 983,

Under the circumstances presented, the Court is compelled to look beyond the pleadings and allocate the burden of proof to the party that must prove the ultimate issue at trial, ExxonMobil.[17]

In its opposition to realignment, SABIC argues that changing the "ordinary order of proofs would be [grossly] unfair to SABIC."[18] The Court does not agree. The Court's obligation is to exercise "reasonable control" over the presentation of evidence "so as to . . . make the presentation effective for the ascertainment of truth . . . ."[19] Under the circumstances presented, there will be no unfairness to SABIC by realigning the order of proof to place the burden of proving the ultimate issue on the party it belongs, thereby making it easier for the jury to understand the presentation of evidence.

CONCLUSION

In the Court's view, proceeding with the order of proof in this manner will promote efficiency, conserve the parties' and

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988 n.4 (D. Neb. 1999) ("In determining the propriety of a declaratory judgment action in circumstances like those presented in this case, the court will realign the parties to reflect the actual controversy underlying the action and determine who is the natural plaintiff.") (citation and quotation omitted).

[17] *See City of Indianapolis v. Chase Nat'l Bank of the City of New York*, 314 U.S. 63, 69 (1941); *Philips v. Liberty Mutual Ins. Co.*, 235 A.2d 835 (Del. 1967); *Bluth v. Bellow*, 1987 WL 9369 (Del. Ch.); *Lutz v. Boas*, 171 A.2d 381, 383 (Del. Ch. 1961).

[18] Pl.'s Br. Opp'n Def.'s Mot. Realign Order Proof Trial Presentation at 10.

[19] DEL. UNIF. R. EVID. 611(a).

the Court's resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion.

For all these reasons, the Defendants' Motion to Realign the Order of Proof for Trial Presentation is **GRANTED**.

/s/ Jan R. Jurden
Jan R. Jurden, Judge